(27,125)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 1039.

THE NEW YORK CENTRAL RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

MICHAEL BIANC. 374

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Record on appeal to Court of Appeals	a	1
Statement under rule 41	1	1
Employee's claim for compensation	2	2
Attending physician's report	5	3
Medical examiner's report	7	4
Notice of award of compensation	9	5
Minutes of hearing, April 8, 1918	13	8
Medical bureau's report, April 8, 1918	24	14
Employer's objections to award	25	15
Synopsis of claim	27	16
Decision and award	28	17
Notice of appeal	32	19
Certification of record	33	19
Order settling case	34	20
Affidavit of no opinion	34	20

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 4, 1919.

2 *Employee's Claim for Compensation.*

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

Division of Claims.

Claim No. 22635A. Case of Michael Bianc.

Having first presented a claim to my employer and not having within ten days thereafter reached an agreement with him for payment of compensation, I hereby present my claim to the State Industrial Commission for compensation for disability resulting from an accident arising out of and in the course of my employment and not occasioned by my wilful intention or solely through intoxication, and in support of it I make the following statement of facts:

Name of injured person: Michael Bianc.

Address (Street and number): 7 Corning St. (City or village and county): West Albany.

Sex: Male. Age: 22. Nationality: Italian. Speak English? Yes. Married? Single.

Date of accident: Dec. 18, 1916. Hour of day: 10 A. M.

On what date were you compelled to stop work as result of this injury? Dec. 18, 1916.

Exact location of place where accident happened? Roundhouse, West Albany Shops.

Was it at the plant or away from it? At the plant.

State occupation when injured: Machinist's helper.

How long have you worked at this occupation? 5 years.

How long have you worked for present employer? 5 years.

Were you doing your regular work when injured? Yes.

3 Piece or time worker? Time. Wages per full day? $2.12—7 days' wk. but time and a half for Sundays.

How did accident happen? Working under engine slipped back against kerosene torch, setting clothes afire.

State fully nature of injury: Burns of head, limbs and body.

Name of employer: New York Central R. R. Co.

Office address: Grand Central Terminal, N. Y. City.

Nature of business: Railroad.

Have you returned to work? Yes.

If so, when? Will advise later.

Have you received any wages (this does not mean compensation) since the date of your accident? Yes, since resuming work for another employer.

Will you be able to take up regular employment when you return to work? Yes.

Name of attending physician: Dr. Edgar Vander Veer. Address: Cor. Eagle and State Sts., Albany.

If taken to hospital, give name and address of hospital and date: Homeopathic Hospital.

Did you request your employer to provide medical attendance? No.

Has he done so? Yes.

Signed, this 21st day of November, 1917, at Albany, N. Y.

MICHAEL BIANC,
(Claimant sign full name here.)
7 Corning St., West Albany.
(Address to which mail should be sent.)

4 STATE OF NEW YORK,
City & County of Albany, ss:

On this 21st day of November, 1917, personally appeared before me the undersigned, a Commissioner of Deeds in and for the said City and County and State, the above named Michael Bianc, to me well known, and to whom I have read the foregoing questions and answers, and all the matter above stated, and who, after being fully advised in the premises, subscribed his name thereto in my presence, and made oath that the foregoing statements, and each and all of them, are full and true, and are made without reservation or concealment

AMBROSE J. O'NEILL.
Post-office Address: Albany, N. Y.

5 *Attending Physician's Report.*

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

Division of Claims.

Claim No. 22635A.

All questions in this blank should be answered, and the report should contain an account of all injuries, no matter how trivial. Fill out blank in ink, using pen or typewriter, and mail promptly to the Commission at its Albany office.

1. Name of injured person: Frank Bianc. Address: 7 Corning St., West Albany.
3. Date of accident: Dec. 18, 1916, at 10 A. M. Was first treatment rendered by you? Yes.
6. Was injured person removed to hospital? Yes. Name of hospital: Homeopathic. Address: Albany, N. Y.
7. Give an accurate description of the nature and extent of the injury: Burn of back of head and back.
8. Describe the treatment: Unquentine dressing. Ears encased and pus drained out.
9. Are the symptons from which he is suffering due entirely to this injury? Yes.

10. Is he able to attend to any part of present or any other occupation? Yes.

11. Has the injury resulted in a permanent disability or disfigurement of head or face? Yes. If so, what? (Permanent disability, such as loss of whole or parts of fingers, etc., must be accurately marked on diagram.) Both ears distorted by burns.

12. Has previous sickness, injury or disease contributed to his disability? No.

14. For what period, from the date of accident (not from
6 date of this report), is disability likely to exist? A. From the surgical viewpoint? 52 weeks.

15. State, in patient's own words, how accident occurred: Fell on kerosene torch.

E. A. VANDER VEER, M. D.,
Per JAMES S. LYONS, M. D.,
Attending Physician,
247 *Quail Street, Albany, N. Y.*
(Address.)

Graduate of Albany Medical College, Year 1915.

Dated at Nov. 23, Albany, N. Y., 1917.

7 ***Medical Examiner's Report.***

STATE OF NEW YORK:

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 230 Fifth Avenue.

Bureau of Claims, Medical Division.

In re Claim No. 22635.

Claimant—Michael Bianc.
Employer—N. Y. Central.
Carrier—Self.
Injured—Dec. 18/16.

Examination by Dr. H. B. Boyle, Dec. 12/17.

Examination of Occipital region shows entire loss of hair due to a severe burn with resultant scar over the entire surface of Occipital bone. Said scar is not adherent.

Examination of entire back shows pigmentation of skin due to burns which have since healed with no functional defects.

Examination of right thorax or axillary line, shows an adherent scar about 3 inches in diameter due to severe burns which have since

healed. This scar is painful in the manipulation of arms above the clavicular line and in ordinary movements of chest.

There is also evidence in the right gluteal region of an extensive scar about three inches in diameter due to severe burn which has since healed. This scar causes pain after prolonged sitting or in some movements of right leg.

Examination of both ears shows a marked deformity as the result of severe burns which are now healed.

Claimant is entitled to compensation for marked cosmetic disfigurement in the Occipital region and for pain caused by scars on right thorax and in the right gluteal region.

8 Claimant is now able to resume work.

DR. H. B. BOYLE,
Medical Examiner.

The Medical Bureau hereby approves a period of — weeks — days disability from date of injury.

(Signed) ——— ———.

Date ——— — ———.

Copy sent to N. Y. C. Dec. 12/17.

9 *Notice of Award of Compensation.*

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

Claim No. 22635A.

Date, December 28, 1917.

To the New York Central R. R. Co., Employer, Grand Central Terminal, New York City, and Michael Bianc, Employee, 7 Corning St., West Albany, N. Y., and Self Insurance Carrier:

You are hereby notified that at a meeting of the State Industrial Commission held Dec. 19, 1917, Room 518, Capitol, a decision and award of compensation was made in the above matter, as follows: $433.44 for 48 weeks' disability at $9.03 per week (this does — include first two weeks for which compensation is payable only in cases in which disability has lasted more than forty-nine days), and the case was Closed.

The employer is hereby directed, in accordance with the provisions of the Workmen's Compensation Law, to pay the above award to the employee in the following manner: $433.44 at once for period from 1-1-1917 to 12-14-1917 and the balance (if any) periodically, in accordance with the method of payment of wages of the employee at the time of injury.

The above copy of the decision and award is sent to you pursuant to sections 20 and 23 of the Compensation Law.
Worked 10 days between 1-1-17 and 12-17-17.

STATE INDUSTRIAL COMMISSION.
JOHN MITCHELL, *Chairman.*

Attest:
WILLIAM S. COFFEY, *Secretary,*
By A. VANALLEN, *Chief of Claims.*
McLEAN.

10 22635, Michael Biano: N. Y. C. R. R. Co. Self.

Former award rescinded claimant to bring action under Federal Employers' Act.

Mr. Grover: In accordance with my previous statement at last hearing of this case, I desire to state that we withdraw any previous contention that this man was engaged in interstate commerce at the time of his accident, and as a rigid investigation fails to develop any evidence supporting any contention that he was engaged in interstate commerce.

January 9, 1918.

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 230 Fifth Avenue.

Notice of Award.

Claim No. 22635, N. Y.

Date, Jan. 16, 1918.

To New York Central R. R. Co., Employer, Grand Central Terminal, N. Y., and Michael Biano, Employee, 7 Corning St., West Albany, N. Y., and Self Insurance Carrier:

You are hereby notified that at a meeting of the State Industrial Commission, held January 9, 1918, a decision and award of compensation was made in the above matter as follows:
Former award rescinded claimant to bring action under Federal Employers' Act.
11 $— for — weeks' disability at $— per week (this does — include first two weeks for which compensation is payable only in cases in which disability has lasted more than forty nine days), and the case was closed.
$— per week for a period of — weeks, beginning —— —, 191—.
The employer is hereby directed in accordance with the provisions

of the Workmen's Compensation Law, to pay the above award to the employee in the following manner:

$— at once for period from —— —, 191—, to —— —, 191—, and the balance (if any) periodically, in accordance with the method of payment of wages of the employee at the time of injury.

The above copy of the decision and award is sent to you pursuant to Section 20 and 23 of the Compensation Law.

STATE INDUSTRIAL COMMISSION.
JOHN MITCHELL, *Chairman.*

Attest:
WILLIAM S. COFFEY, *Secretary,*
By A. VAN ALLEN, *Chief of Claims.*
C. MUNGER.

NOTE.—Correspondence should be addressed to 230 Fifth Avenue, New York City.

To the Claimant:

Call at the office of the insurance carrier given above, to collect the amount of award.

12 April 11, 1918.

Re Albany, No. 22635, Michael Biano—N. Y. Central R. R. Co.

To Mr. Frank V. Whiting, c/o the New York Central R. R. Co., Grand Central Terminal, New York City; to Mr. Michael Biano, 7 Corning Street, West Albany, New York; to Mr. Edwin W. Sanford, 71 State Street, Albany, N. Y.:

The above case was presented to the Commission in Session on Monday, April 8, 1918, for consideration as to disfigurement, and whether an award can be made.

After careful consideration of the papers in the case, and the testimony taken at this Hearing, a resolution was passed to the effect that the award made on December 19, 1917, for 48 weeks' compensation at $9.03 a week, amounting to $433.44 be re-instated, and in addition the claimant was awarded $1,500.00 for serious facial and head disfigurement, and the case closed.

The claimant will no doubt receive a check covering the compensation due, direct through the office of the Employers mentioned above, in the course of the next few days, for which a proper receipt should be secured, and same sent to this Office, to enable us to keep a correct record of the compensation paid. If, however, the compensation awarded is not paid within a reasonable length of time, the Claimant is requested to so advise Mr. Edward B. Wickham, and his case will be given further attention.

Yours truly,

—— ——, *Secretary.*

E. B. W./R. B.

13 *Minutes of Hearing.*

State Industrial Commission.

Albany, 22635.

MICHAEL BIANC

vs.

N. Y. CENTRAL RAILROAD Co.

Self Insurance.

Minutes of Hearing at 230 Fifth Avenue, New York City, Monday, April 8, 1918.

Before Commissioners Lyon, Sayer and Wiard.

Appearances:

Mr. Michael Bianc, claimant.
Mr. E. W. Sanford, 71 State Street, Albany, N. Y., for the claimant.
Mr. O. W. Brown, for the railroad company.

Mr. Brown: This case came on some time ago. In the first place, this man was injured, as you will notice, on the 18th of December, 1916. The case came on at Albany and an award was made on the 19th of December, 1917, forty-eight weeks, total $433.44. That was made, I believe on the report of physical examination made by your Dr. Boyle, who said on the 12th of December, 1917, that claimant was ready for work. Now, we have not been disposed to raise any question on the case at all, but have been disposed to pay the award because he was apparently laid up as a general proposition up to about that time. He had done some work for a contractor, I believe, prior to that time, and about ten days deducted by Mr. Abbott in computing that award.

14 Clerk of Session: It shows that he worked ten days between January 1st and December 17th; he worked about ten days.

Mr. Brown: Now, this man never served any notice whatever in this case. Now, we haven't any disposition to dispute the man's right to compensation; nor have we a disposition to dispute the question of notice at all. But if he is going to continue the proposition of refusing compensation and threaten law-suits and things like that, we might just as well raise all the questions that are to be raised in this case. Up to this time there is no notice whatever.

Com. Lyon: Have you offered him compensation?

Mr. Brown: Sure. We tried to pay it to him the day that the award was made.

Com. Lyon: Why doesn't he take it?

Mr. Sanford: The proposition that comes before us at this time is the matter of disfigurement.

Com. Lyon: What has that to do with his taking compensation?

Mr. Sanford: I don't know that that will have anything particular to do with it. It seems there was some question before I came into the matter about whether he had a case under the Federal law.

Com. Lyon: Of course, if he has he cannot get compensation.

Mr. Sanford: Since I came into the case, I have become convinced myself that there is no—it is purely a case for this Commission to pass upon.

Mr. Brown: I think Mr. Sanford is right. I think there may have been some doubt of that at the start. I think we might have established that if we had full knowledge at the start and examined into it; but in order to determine that we have to make an early investigation, which we did not do in this case.

Mr. Sanford: I think he has thoroughly decided that this is his only place. That is why we are here now. But under the special act provided for it some six months before he was injured, the Commission make an allowance for disfigurement. We are simply waiting for you to examine the claimant.

Com. Lyon: What is his disfigurement?

Mr. Sanford: He is the best exhibit there is of that. Of course, his whole body is scarred and disfigured; he was burned.

(Claimant submits to physical examination by the Commission).

Com. Lyon: The Court provides for facial or head disfigurement, not the body.

Examination of Claimant.

By Mr. Brown:

Q. When did you go to work, Mike?
A. When? This last time?
Q. Yes.
A. That I couldn't tell you.
Q. About when?
A. About three months.
Q. Been working about three months the last time?
A. Yes.

Com. Lyon: The award made up to December 14, 1917, for forty-eight weeks?

Mr. Brown: Yes; at that time Dr. Boyle said he was now ready for work.

Mr. Sanford: He went back to work and tried to work, that ten days—he tried to work but had to give it up.

Com. Lyon: What do you say about this disfigurement? (addressing Mr. Brown).

Mr. Brown: I am opposed to any award for disfigurement unless that disfigurement is the cause of disability.

Mr. Sanford: There is nothing in the law that I can see that confines it to that view.

16 Com. Lyon: We have always thought it ought to have some relation to a man's ability to work. There ought to be some relation between his ability to earn wages—I think this disfigurement is likely in the course of time to hinder his getting the wages that he otherwise would. Have you (addressing Mr. Brown) seen the back of his head? Here is a young man with all the probabilities before him; his hair is off on the back.

Mr. Sanford: His hearing is affected too.

Com. Lyon: I understand they found there was no relation between disfigurement and his ability to earn wages. Can you (addressing claimant) hear as good as before?

Claimant: I can hear, but mornings I can't hear a thing; not every morning, but some mornings I can't hear a thing; not always, but most every morning.

Com. Lyon: I think he is entitled to some disability for that.

Mr. Brown: I wouldn't think he was entitled to anything but his compensation up to the time he went back to work. I think it has been found by the doctors that there is no relation between the disfigurement and the man's ability to work.

Com. Lyon: Of course, it is impossible to state just how much that would interfere with his earning—a young man like him that has got to go all his life.

Mr. Brown: That is true, but that remains with the continuing power of the Commission to make an adjustment of subsequent years.

Mr. Sanford: Possibly that wouldn't prevent his "doping" up engines, the work he was doing when he was hurt, but nobody would presume that the boy would continue to "dope" engines.

Mr. Brown: No, but his work is of a laborious nature, and he has been able to do that sort of work since he was hurt.

17 Com. Lyon: How much education have you had? (Addressing claimant.)

Mr. Sanford: Went through grammar school, didn't you?

Claimant: Yes, sir, eighth grade.

Mr. Brown: Born in this country?

Claimant: Yes, sir.

Mr. Brown: How old are you now?

Claimant: Twenty-three.

Mr. Brown: What work have you done since you left school—where have you been working—different places?

Claimant: I worked at Carr Bros. grocery store; I worked on a farm; I worked down at Drislane's; I worked in the West Albany stock yard.

Mr. Brown: You worked in the engine house at the time you were injured?

Claimant: Yes, sir.

Com. Lyon (addressing Mr. Sanford): How much do you think he ought to have for disfigurement?

Mr. Sanford: I think he ought to have a very liberal allowance.

Of course, the limit is $3500. That would not be too much if the case would get to jury on a case of that kind.

Com. Lyon: No, but you take the chance of getting nothing. On what a man would get before a jury in the way of a sympathetic proposition—that is a different proposition entirely.

Mr. Sanford: Here is a young man just starting in life with all the possibilities of life before him; he will carry that disfigurement.

Mr. Brown: The chief burden is on the young fellow himself in the injury to his feelings. It is not to his earning capacity by any means.

Mr. Sanford: It is to his ability to obtain employment. People do not care to have disfigured people employed.

18 Mr. Brown: Not in the condition he is in.

Com. Lyon: You would hesitate about putting that man in the office with other men.

Mr. Sanford: He is really barred from the general public as a place of employment.

Claimant: I have a scar on my side; I can hardly do no heavy work. I suppose you know about that, all the way around the side, skin overgrown, that I can't lie on it or anything else.

Mr. Sanford: He hasn't fully recovered from those injuries.

Com. Lyon: Of course, so far as disability is concerned, when he gets back earning his old wages, that has to stop.

Mr. Brown: You know that award was rescinded, Mr. Lyon.

Com. Lyon: Why?

Mr. Brown: I can't tell you except this.

Mr. Sanford: It was held in abeyance really.

Mr. Brown: We got notice that the award was rescinded. On January 9, 1918, Mr. Abbott sent us notice that the former award was rescinded, claimant to bring action under the Federal Employers' Liability Act. Now, that is something we don't know about. As I understand it—I may say this: I have heard this and it is just pure hearsay: Mr. Bianc and some man from Albany, who wasn't Mr. Sanford, went to Mr. Abbott and said he didn't want compensation, that he wanted to sue under the Federal Act, and they wanted that award rescinded.

Com. Lyon: I understand you have definitely decided now that you will take compensation and not rely on your rights under the Federal Act.

Claimant: I don't know what you said.

Com. Lyon: I understand you now want to take compensation and not rely on any rights you have got under the Federal law. Of course, you have to make your decision; you can't have both.

19 Mr. Sanford: That is the way I understand it.

Com. Lyon: You better go on record one way or the other. That is what you want now, isn't it?

Claimant: Why, yes.

Com. Lyon: That being so, let the records show that he is given compensation up to the date when he went back to work.

Mr. Sanford: What time did you go back to work?
Claimant: It is about three months ago.
Mr. Brown: Was it New Year's day?
Claimant. It was before New Year's.
Mr. Brown: Then some time in December?
Mr. Sanford: Before Christmas?
Claimant: No, after Christmas.
Mr. Sanford: Between Christmas and New Years?
Claimant: Yes.

Mr. Brown: I think that award is about right.

Com. Lyon: Previous award will be reinstated and the case closed so far as compensation is concerned. If that trouble with your side does get sometime where it stops your working, you can come back and ask to have the case reopened.

Com. Lyon: What about the disfigurement?

Mr. Brown: I don't think he is entitled to anything.

Com. Lyon: Well, I do.

Mr. Brown. Unless it is established that it has some relation to his earnings.

Com. Lyon: I don't know what the other commissioners would say about it, but I am convinced that he is entitled to compensation for that. I shouldn't think we ought to go to $3500. The back of the head is bad enough, but the ears in addition to that—I should think he ought to have $1000.

Mr. Brown: I couldn't consent to that.

Com. Lyon: Ask the other commissioners to come in here. (To this time only Com. Lyon had been present.)

Mr. Brown: There is a real question of notice in this case, as this accident happened on December 18, 1916 and November 26, 1917, is the first notice we had.

Com. Lyon: If they put the fire out with a hose it must have been pretty well known.

Mr. Brown: No question about that. He went to the hospital and was attended in the usual way.

Mr. Sanford: Four months and a half in the hospital.

Mr. Brown: The advantage of having notice is that one has an opportunity to look up all the points in a case. Now, we think if we had known there was a claim for compensation in this case, within the legal time, we would have had an opportunity to have investigated as to whether or not it was a Federal case. That certainly was not made.

Com. Lyon: Don't you suppose you did investigate?

Mr. Brown: We have absolutely lost the record. I had an investigation made but we couldn't find what the records were.

Mr. Sanford. You know this—that this engine was in the yard for repairs.

Mr. Brown: I will concede that.

Mr. Sanford: Your company certainly has a record of every place that engine has been put. You know the number of the engine; you

know it was run into the shop for repairs; you know it was being doped up.

Com. Lyon: Physical examination shows that scars on the back of the head and neck have entirely denuded his head from his hair, at least half way up his head in the rear, and there are serious
21 burns to both ears by which they are shriveled. The ears are badly shriveled but have healed. He states in the morning it is difficult for him to hear.

(Com. Wiard enters and examines claimant.)

Mr. Brown: Will you consent to a photograph going into the record?

Mr. Sanford: Sure.

Mr. Brown: Or a series of photographs showing just what they are.

Com. Lyon: Certainly.

Mr. Brown: I question the fact of this finding.

Mr. Lyon: If you have pictures taken, you ought to have pictures taken of the back of his head and both sides?

Mr. Brown: I should say about three pictures.

(Com. Sayer enters.)

Com. Lyon (addressing Com. Sayer): Look at that disfigurement.

Com. Sayer: How does it affect your hearing on this side?

Claimant: I can't hear a thing hardly in the morning both sides.

Com. Lyon: You can hear pretty well now?

Claimant: I can hear good during the day, only in the morning; sometimes gets me around the noon hour.

Com. Sayer: My view of the facial disfigurement provision of the law is that it is practically in lieu of damages.

Mr. Brown: Then I object that it is contrary to the spirit of compensation entirely. When you rule that compensation is damages you rule contrary——

(All three commissioners confer.)

Com. Lyon: My friends here are rather higher priced than I am.

Mr. Brown: I assume that as far as compromise is con-
22 cerned we would be perfectly willing to compromise on the question of paying some compensation, but if it is going to be a high amount I am frank to say we will have to take the case up.

Com. Sayer: A good deal depends upon the definition of "high."

Mr. Brown: I am considering between nothing and Mr. Lyon's level, and now you are both higher than that.

Com. Sayer: The concensus seems to put it at $1500.

Mr. Brown: I couldn't consent to that.

Com. Lyon: In case there is an appeal photographs shall be made and put in the appeal book. Everybody consents to that, I take it—of the back of the head and both sides of the face. Mr. Sayer suggests that we have Dr. Lewy put a description of the injury right into the record.

Mr. Brown: With measurements?

Com. Lyon: Yes, and with description. Suppose you (addressing claimant) go back to our doctor and let him make it in writing and file it in the record.

Mr. Brown: I have a right to reserve all kinds of objection here as far as the record is concerned.

Mr. Sayer: I think you have.

Com. Lyon: If there is any question about notice, I think the record ought to be full. It ought to appear here that he was so badly burned that you sent him to the hospital yourselves.

Mr. Brown: Yes, but it further appears that he went to the hospital and the first we heard of the case as far as the notice was concerned was November 26th.

Com. Lyon: Let the records show that he was burned by a torch and the employer was compelled to turn a hose on him in order to extinguish the fire, and they were obliged to take him to a hospital where he was for four and a half months.

23 (Claimant returns from examination in our medical department.)

Com. Sayer: Dr. Lewey's description of the injury as presented to the Commission is considered by the Commission previous to the award for the facial disfigurement.

M. Simmons, Hearing Stenographer.

24 *Medical Bureau's Report.*

STATE OF NEW YORK:

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 230 Fifth Avenue.

Bureau of Claims, Medical Division.

In re Case No. 22635.

Michael Bianc, 7 Corning St., West Albany, N. Y.

Self.

12/18/16.

Examination of body shows several scars in consequence of burns situated over the right side of the thorax in the axillary line which healed with kaloid scars; several superficial burns and extensive pigmented scars over both shoulder blades; also extensive scar over the right gluteal region. These scars although indicative of extensive burns do not interfere with the function of any of these parts. There is evidence of a very extensive scar over the entire occipital region

with loss of hair in consequence of destruction of all hair follicles. In addition to this scar there is a marked remaining external visible defect of both ears due to the defective scars following the destruction of the tissues of the ear shell. The outer ear canal is not involved in the scar tissues.

Claimant is able to distinctly hear sound of tuning fork but time of duration of sound is diminished. He also hears ordinary conversation.

April 8, 1918.

J. O. D. DR. R. LEWY.

The Medical Bureau hereby approves a period of — weeks — days disability from date of injury.

(Signed) DR. R. LEWY.

Date ——— —, ——.

25 *Objections to Award.*

Before State Industrial Commission.

Claim No. 22635.

In the Matter of the Claim of MICHAEL BIANO for Compensation under the Workmen's Compensation Law

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-insurer.

STATE OF NEW YORK,
City and County of Albany, ss:

The above named employer and self-insurer hereby objects to the rendition of any award herein upon the following grounds:

1. That no notice of injury was given to said employer within ten days after disability, as prescribed by §18 of the Workmen's Compensation Law;

2. That to make to the claimant herein any award for facial or head disfigurement, under the provisions of §15 of the Workmen's Compensation Law, will be tantamount to making an award not for loss of earning power, but for damages, and will, therefore, deprive said employer of its property without due process of law, in contravention of the provisions of the Fourteenth Amendment to the Federal Constitution.

3. That to make to the claimant herein any award for facial or head disfigurement, under the provisions of §15 of the Workmen's Compensation Law will be tantamount to making an award not for

loss of earning power, but for damages, and will, therefore,
26 deprive said employer of its right to trial by jury, guaranteed by §2 of Article 1 of the constitution of the State of New York.

Dated April 8th, 1918.

NEW YORK CENTRAL RAILROAD COMPANY.
By O. G. BROWNE, *Attorney.*

27 *Synopsis of Claim.*

No. 22635.

Does claim come under law? Yes. Group 3.
Name of Employee: Michael Bianc.
Address of Employee: 7 Corning St., West Albany.
Name of Employer: The New York Central Railroad Co.
Insurance Carrier: Self.
Date of Injury: 12-18-16. Compensation commences 1-1-1917.
Nature and extent of injury: Burns on head & body.
Daily wages $2.12 multiplied by 332=$703.84 divided by 52= Average weekly wages $13.55. Two-thirds of weekly wages $9.03.
Estimated Disability 48 weeks and — days @ $9.03 weekly. Amount to be paid now $433.44 From 1-1-1917 to 12-14-17. (Worked ten days between 1-1-17 and 12-17-17.)
Continued or closed? Closed.
Date of hearing: Dec. 19, 1917.

GEO. A. MAGIN, *Examiner.*

Continuance.

Date of hearing: 1-9-1918.
Continued or closed? Former award rescinded.
If continued, to what date? Claimant to bring action under Federal Employers' Act.

GEO. A. MAGIN, *Examiner.*

As per Mr. Abbott's recommend.

Continuance.

Comm. in Sess.
Date of hearing, April 8, 1918.
The award made on Dec. 19th was re-instated, which was for 48 weeks, amounting to $433.44 from Jan. 1, 1917 to Dec. 14, 1917.
In addition to this award the Claimant was awarded $1500.00 for serious facial and head disfigurement.

EDW. B. WICKHAM, *Examiner.*

Notice sent.
Award No. 3866.

28 *Decision and Award.*

State Industrial Commission.

File No. 22635.

In the Matter of the Claim for Compensation, under the Workmen's Compensation Law, Made by MICHAEL BIANC

against

NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self Insurer.

This claim came on for hearing before State Industrial Commission at Albany, New York, on December 10, 1917, December 19, 1917 and January 9, 1918, and at New York City on April 8, 1918.

Appearances:

Robert W. Bonynge, Esq., Counsel to State Industrial Commission.

Visscher, Whalen & Austin, Esqs., Attorneys for Employer and Self-insurer.

Edwin W. Sanford, Esq., Attorney for claimant.

All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its Conclusions of Fact, Ruling of Law, Award and Decision, as follows:

29 Conclusions of Fact.

1. On December 18, 1916, the day when Michael Bianc received his injuries, he resided at No. 7 Corning Street, West Albany, New York, and was employed by the New York Central Railroad Company engaged in the operation, including construction and repair of a railroad operated by steam power, and in the operation of car shops, machine shops and other work for the purposes of such railway, and to be used in connection with it when operated. Michael Bianc was employed as a machinist helper at the round house of the west Albany shops.

2. On said date, Michael Bianc was working for his employer at the round house of the West Albany shops, and while engaged in the regular course of his employment while working on an engine, which was in the round house for repairs, and whlie working under said engine, he slipped against a kerosene torch, and his clothes were thereby set afire, so that it was necessary for the employer to turn a hose on him, in order to extinguish the fire. He sustained burns to the head, limbs and body, which disabled him from working from the date of said injury to December 14, 1917, with the exception of ten days that he was able to work during that period.

The injuries received by Michael Bianc on said date also resulted in serious facial and head disfigurement. The nature of said disfigurement consists of an extensive scar over the entire occipital region of the head with loss of hair in consequence of the destruction of all hair follicles, and as a result of serious burns to both ears there is a marked external visible defect of each ear due to the defective scars following the destruction of the tissues of the ear shell, and both ears are badly shrivelled. Photographs of back of the head and both sides of the face are to be included as part of the record in this case.

3. The average weekly wage of Michael Bianc was the sum of $13.55.

4. The injuries sustained by Michael Bianc were accidental injuries and arose out of and in the course of his employment.

5. On December 18, 1916 and at the time of said accident Michael Bianc was not engaged in interstate commerce.

6. Written notice of injury was not given to his employer within ten days after disability, but the employer was aware of the accident at the time of the happening thereof it being necessary to turn a hose upon Michael Bianc to extinguish the fire, and by reason of said accident the employer was obliged to take Michael Bianc to a hospital, where, on account of said injury, he was required to remain for 4½ months; therefore, the employer was not prejudiced by the failure to give such written notice. The nature of the injury and the seriousness of the same constitute sufficient reason why written notice of injury could not be given to the employer within ten days after disability.

Ruling of Law.

This claim comes within the provisions of Chapter 67 of the Consolidated Laws, being Chapter 816 of the Laws of 1913, as reenacted and amended by Chapter 41 of the Laws of 1914, and amended by Chapter 316 of the Laws of 1914, and as further amended by the Laws of 1915 and 1916.

Award.

Award of compensation is hereby made against New York Central Railroad Company, Employer and Self-insurer, to Michael Bianc, injured Employee, at the rate of $9.03 weekly for the period of 48 weeks from January 1, 1917 to December 14, 1917, which is exclusive of the ten days that he was able to return to work during that period.

Award of compensation is further made against New York Central Railroad Co., Employer and Self-insurer, to Michael Bianc in the sum of $1500.00 account of and in view of the serious facial and head disfigurement resulting from the injuries sustained on December 18, 1916.

Decision.

The failure of Michael Bianc to give written notice of injury to his employer within ten days after disability is hereby excused on the ground that the employer was not prejudiced by such failure, and on the further ground that the nature and extend of the injuries sustained by Michael Bianc constituted sufficient reason why such written notice could not have been given.

Dated April 8, 1918.

STATE INDUSTRIAL COMMISSION,
EDW. P. LYON, *Vice-Chairman;*
HENRY D. SAYER,
LOUIS WIARD, *Commissioners.*

32 *Notice of Appeal.*

State Industrial Commission.

Claim No. 22635.

In the Matter of the Claim of MICHAEL BLANC for Compensation under the Workmen's Compensation Law

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-insurer.

To the Attorney General of the State of New York; the State Industrial Commission; Hon. Robert W. Bonynge, Counsel to said Commission; Michael Bianc, claimant, 7 Corning St., West Albany, N. Y.:

Take notice that the New York Central Railroad Company, employer herein, hereby appeals to the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, from each and every part of the decision and award of the State Industrial Commission herein rendered April 8th, 1918.

Dated April 18th, 1918.

Yours, &c.,

VISSCHER, WHALEN & AUSTIN,
Attorneys for the New York Central Railroad Company.

Office and Postoffice Address, 126 State Street, Albany, N. Y.

33 *Certification of Record.*

I, William S. Coffey, Secretary of the State Industrial Commission, do hereby certify that I have compared the foregoing papers (except the Statement under Rule 41) with the respective originals

thereof on file in the office of the State Industrial Commission, and that the same are true and correct copies of said originals, and of the whole thereof, and that said papers constitute all of the papers and the proceedings herein, including the evidence, which were before said State Industrial Commission in relation to the foregoing claim.

In Witness Whereof, I hereunto set my hand and the official seal of the State Industrial Commission on the — day of July, 1918.

[L. S.] WILLIAM S. COFFEY,
Secretary State Industrial Commission.

34 *Order Settling Case.*

Ordered, that the foregoing printed record is hereby settled as and for the record upon the appeal herein taken to the Appellate Division of the Supreme Court, Third Department, and that said record be filed in the office of the Clerk of said Court.

Dated, New York City, N. Y., July —, 1918.

EDWARD P. LYON,
Vice-Chairman State Industrial Commission.

Affidavit of No Opinion.

STATE OF NEW YORK,
City and County of Albany, ss:

Robert E. Whalen, being duly sworn, deposes and says, that he is one of the attorneys for the appellant in this proceeding, wherein no opinion was written by the State Industrial Commission.

ROBERT E. WHALEN.

Subscribed and sworn to before me this 1st day of August, 1918.

EDITH L. JONES,
Notary Public, Albany County, N. Y.

35 *Appellate Division's Order of Affirmance.*

At a Term of the Appellate Division of the Supreme Court in and for the Third Department, Held at the Court-house, in the City of Albany, N. Y., Commencing on the 12th Day of November, 1918.

Present: Hon. John M. Kellogg, Presiding Justice.
" George F. Lyon,
" John Woodward,
" A. V. S. Cochrane,
" Henry T. Kellogg,
Associate Justices.

In the Matter of the Claim for Compensation, under the Workmen's Compensation Law, Made by MICHAEL BIANC, Employee, Respondent,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-Insurer, Appellant.

The above-named The New York Central Railroad Company having appealed from the award of the State Industrial Commission entered in the office of said Commission on the 8th day of April, 1918, whereby compensation was awarded to the above-named Michael Bianc, injured Employee, at the rate of $9.03 weekly for the period of 48 weeks from January 1, 1917, to December 14, 1917,
36 which is exclusive of the ten days that he was able to return to work during that period. Award of compensation is further made against New York Central Railroad Co., Employer and Self-Insurer, to Michael Bianc in the sum of $1,500.00 account of and in view of the serious facial and head disfigurement resulting from the injuries sustained on December 18, 1916; and said appeal having come on to be heard in this court, and having been argued by Robert E. Whalen, Esq., of counsel for the appellant, and E. C. Aiken Deputy Attorney General, for the State Industrial Commission, and due deliberation having been had thereon.

Now, on motion of Merton E. Lewis, Attorney General, attorney for the State Industrial Commission, it is,

Ordered, that said award of the State Industrial Commission appealed from be and the same is hereby unanimously affirmed.

JOSEPH H. HOLLANDS, *Clerk.*

A Copy.
[L. S.] JOSEPH H. HOLLANDS, *Clerk.*

37 *Order of Industrial Commission.*

Before the State Industrial Commission

In the Matter of the Claim of MICHAEL BIANC for Compensation under the Workmen's Compensation Law

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-insurer.

The above-named New York Central R. R. Co. employer and self-insurer, having appealed to the Appellate Division of the Supreme Court in and for the Third Judicial Department, from the award and decision of the State Industrial Commission, made and entered herein on the 8th day of April, 1918, whereby compensation was awarded

the above-named Michael Bianc, at the rate of $9.03 weekly for a period of 48 weeks from January 1, 1917, to December 14, 1917, which is exclusive of the ten days that he was able to return to work during that period; and in the sum of $1,500.00 on account of and in view of the serious facial and head disfigurement resulting from the injuries sustained on December 18, 1916; and said appeal having been duly heard by said Court, and the Appellate Division of the Supreme Court having at a term thereof commencing on the 12th day of November, 1918, unanimously affirmed the award and
38 decision heretofore made by the State Industrial Commission, and the papers on appeal herein together with a certified copy of the said order of the Appellate Division having been duly filed; it is

Ordered, that the order of the Appellate Division be and the same hereby is made the order of the State Industrial Commission, and the award heretofore made herein be and the same hereby is affirmed with interest from April 8, 1918.

Dated, New York, Nov. 25, 1918.

W. S. COFFEY, *Secretary.*

39 *Notice of Appeal to Court of Appeals.*

Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim of Compensation, under the Workmen's Compensation Law, Made by MICHAEL BIANC, Employee, Respondent,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-insurer, Appellant.

To Hon. Merton E. Lewis, Attorney General; Robert W. Bonynge, Esq., Counsel to State Industrial Commission; Edwin W. Sanford, Esq., Attorney for Respondent; Hon. Joseph H. Hollands, Clerk Appellate Division, Third Department.

SIRS: Take notice, that The New York Central Railroad Company, employer and self-insurer herein, hereby appeals to the Court of Appeals of the State of New York from each and every part of the order entered in the office of the Clerk of the Appellate Division of
40 the Supreme Court, in and for the Third Judicial Department, on the 19th day of November, 1918, affirming the decision and award of the State Industrial Commission herein rendered April 8th, 1918.

Dated, December 3rd, 1918.

Yours, &c.,

VISSCHER, WHALEN & AUSTIN,
Attorneys for Appellant.

Office and Post Office Address, 126 State Street, Albany, N. Y.

41 *Stipulation as to Record.*

Stipulated, pursuant to §3301 of the Code of Civil Procedure, that the foregoing printed copies of the Record in the Appellate Division, Appellate Division's order of affirmance, order of State Industrial Commission rendered thereon, and notice of appeal to the Court of Appeals are true and correct copies of the whole of the respective originals thereof, and that certification of said printed copies is hereby waived.

Dated, December 10th, 1918.

MERTON E. LEWIS, *Attorney General,*
By E. C. AIKEN, *Deputy.*
ROBERT W. BONYNGE,
Counsel to State Industrial Commission.
EDWIN W. SANFORD,
Attorney for Respondent.
VISSCHER, WHALEN & AUSTIN,
Attorneys for Appellant.

42 *Affidavit of No Opinion.*

STATE OF NEW YORK,
City and County of Albany, ss:

Robert E. Whalen, being duly sworn, deposes and says that he is one of the attorneys for the appellant in this proceeding, wherein no opinion was written by the Appellate Division.

ROBERT E. WHALEN.

Subscribed and sworn to before me this 12th day of December, 1918.

EDITH L. JONES,
Notary Public, Albany County, N. Y.

43 STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the Court of Appeals, Held at Court of Appeals Hall, in the City of Albany, on the 8th Day of April, in the Year of Our Lord One Thousand Nine Hundred and Nineteen, Before the Judges of said Court.

Witness, the Hon. Frank H. Hiscock, Chief Judge, presiding.
R. M. BARBER, *Clerk.*

Remittitur, April 9th, 1919.

In the Matter of the Claim for Compensation, &c., of MICHAEL BIANC, Employee, &c.

Be it remembered, That on the 23rd day of Decem' er in the year of our Lord one thousand nine hundred and eighteen, The New York Central Railroad Company &c., the appellant in this cause, came here into the Court of Appeals, by Visscher, Whalen & Austin, its Attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And State Industrial Commission & ano., the respondents in said cause, afterwards appeared in said Court of Appeals by Merton E. Lewis & ano., their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

44 Whereupon, the said Court of appeals having heard this cause argued by Mr. Robert E. Whalen, of counsel for the appellant, and by Mr. E. C. Aiken, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is affirmed, with costs, on authority of Matter of Sweeting v. American Knife Co. &c., decided herewith.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division, Third Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

R. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

Albany, April 9, 1919.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER, *Clerk.*

45 At a Term of the Appellate Division of the Supreme Court in and for the Third Department, Held at the Court-house, in the City of Albany, N. Y., Commencing on the 6th Day of May, 1919.

Present: Hon. John M. Kellogg, Presiding Justice; Hon. George F. Lyon, Hon. John Woodward, Hon. A. V. S. Cochrane, Hon. Henry T. Kellogg, Associate Justice.

In the Matter of the Claim for Compensation, under the Workmen's Compensation Law, Made by MICHAEL BIANC

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-insurer, Appellant.

The above named The New York Central Railroad Company having appealed from the order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department, made at a Term commencing on the 12th day of November, 1918, which affirmed an award of the State Industrial Commission entered in the office of said Commission on the 8th day of April, 1918, whereby compensation was awarded to the above named Michael Bianc, injured employee, at the rate of $9.03 weekly for a period of 48 weeks from January 1, 1917, to December 14, 1917, which is exclusive of the ten days that he was able to return to work during that period. Award of compensation was further made against the New York Central Railroad Company, employer and self-insurer, to Michael Bianc in the sum of $1,500.00 on account of and in view of
46 the serious facial and head disfigurement resulting from the injuries sustained on December 18, 1916, against which award for facial and head disfigurement appellant, when this cause was before this Court, contended that to make said award would be tantamount to making an award, not for loss of earning power, but for damages, and would, therefore, take the property of appellant without due process of law, in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States; and said appeal having been argued in the Court of Appeals by Robert E. Whalen, Esq., of counsel for the appellant, and E. C. Aiken, Deputy Attorney General, for the State Industrial Commission, and the Court of Appeals after due deliberation had thereon did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from be affirmed with costs; and further ordered that the record and proceedings be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law; and the said remittitur having been filed in this Court,

Now, on motion of Charles D. Newton, Attorney General, attorney for the State Industrial Commission, it is

Ordered, that the order and judgment of the Court of Appeals be and the same is hereby made the order of this Court, and that the award or decision of the State Industrial Commission entered on the

8th day of April, 1918, be and the same is hereby in all respects affirmed with $99.50 costs to be paid by the appellant.

JOSEPH H. HOLLANDS, *Clerk.*

47 Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim for Compensation, under the Workmen's Compensation Law, Made by MICHAEL BIANC, Employee, Respondent,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-insurer, Appellant.

It is hereby stipulated by and between the attorneys for the respective parties hereto, pursuant to Rule 8 of the Supreme Court of the United States, that the following portions of the record shall constitute the transcript of record on writ of error from the Supreme Court of the United States, and that the clerk shall transmit to the Clerk of the Supreme Court of the United States only the papers herein designated as follows:

Statement Under Rule 41;
Employee's Claim of Compensation;
Medical Examiner's Report;
Attending Physician's Report;
Notice of Award of Compensation;
Minutes of Hearing, April 8, 1918;
Medical Bureau's Report, April 8, 1918;
Employer's Objection to Award;
Synopsis of Claim;
Decision and Award;
Notice of Appeal to Appellate Division;
Certification of Record;
Order Settling Case;
Affidavit of No Opinion by Commission;
48 Order of Affirmance by Appellate Division;
Order of Industrial Commission thereon;
Notice of Appeal to Court of Appeals;
Stipulation as to Record in Court of Appeals;
Affidavit of No Opinion in Appellate Division;
Judgment of the Court of Appeals;
Order of Appellate Division entered on judgment of Court of Appeals.

Dated, May 19th, 1919.

VISSCHER, WHALEN & AUSTIN,
Attorneys for Appellant.
CHARLES D. NEWTON (E. C. A.),
Attorney General of the State of New York,
Attorney for Respondent.

49 [Endorsed:] Original. Supreme Court, Appellate Division, Third Department. In the Matter of the Claim, &c.,

made by Michael Bianc, Employee, Respondent, against The New York Central Railroad Company, Employer and Self-insurer, Appellant. Stipulation pursuant to Rule 8 of the U. S. Supreme Court. Visscher, Whalen & Austin, Attorney for Appellant, Office and Post-Office Address 126 State Street, Albany, N. Y.

50 Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim for Compensation, under the Workmen's Compensation Law, Made by MICHAEL BIANC, Employee, Respondent,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-insurer, Appellant.

STATE OF NEW YORK,
Third Judicial Department, ss:

I, Joseph H. Hollands, Clerk of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Michael Bianc, employee, respondent, against The New York Central Railroad Company, employer and self-insurer, appellant, as set forth in the annexed stipulation, bearing date May 19th, 1919, and made pursuant to Rule 8 of the Supreme Court of the United States between the attorneys for the respective parties hereto, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Albany, State of New York, this 19th day of May, 1919.

[Seal Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk of the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York.

51 [Endorsed:] Original. Supreme Court, Appellate Division, Third Department. In the Matter of the Claim, &c., made by Michael Bianc, Employee, Respondent, against The New York Central Railroad Company, Employer and Self-insurer, Appellant. Authentication of Record. Visscher, Whalen & Austin, Attorneys for Appellant, Office and Post-Office Address, 126 State Street, Albany, N. Y.

52 Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim for Compensation, under the Workmen's Compensation Law, Made by MICHAEL BIANC, Employee, Respondent,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-insurer, Appellant.

STATE OF NEW YORK,
Third Judicial Department, ss:

In obedience to the commands of the writ of error herein allowed May 14th, 1919, I herewith transmit to the Supreme Court of the United States a duly certified transcript of such portions of the record and proceedings in the above entitled cause as, in pursuance of Rule 8 of the Supreme Court of the United States, the attorneys for the respective parties hereto have by stipulation designated, with all things concerning the same.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Albany, State of New York, this 19th day of May, 1919.

[Seal Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk of the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York.

53 [Endorsed:] Original. Supreme Court, Appellate Division, Third Department. In the Matter of the Claim, &c., made by Michael Bianc, Employee, Respondent, against The New York Central Railroad Company, Employer and Self-insurer, Appellant. Return to Writ of Error. Visscher, Whalen & Austin, Attorneys for Appellant, Office and Post-Office Address, 126 State Street, Albany, N. Y.

54 Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim for Compensation, under the Workmen's Compensation Law, Made by MICHAEL BIANC, Employee, Respondent,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Employer and Self-insurer, Appellant.

STATE OF NEW YORK,
Third Judicial Department, ss:

I, Joseph H. Hollands, Clerk of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, do hereby certify that there have been lodged with me, as such Clerk, this day, in the above entitled cause:

1. The original bond, of which a copy is hereto annexed;
2. Two copies of the writ of error as herein set forth, one for the defendant in error above and one to file in my office;
3. One copy of the prayer for reversal, petition and assignment of errors herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Albany, State of New York, this 19th day of May, 1919.

[Seal Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk of the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York.

55 Supreme Court of the United States.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-error,

against

MICHAEL BIANC, Defendant-in-error.

Know all men by these presents, that The National Surety Company of New York, a corporation organized and existing under and by virtue of the Laws of the State of New York, and having its principal place of business at 115 Broadway, in the Borough of Manhattan, in the City of New York, is held and firmly bound unto Michael Bianc in the sum of Two thousand five hundred Dollars ($2,500.00), lawful money of the United States, to be paid to said Michael Bianc, his executors, administrators and assigns, for which payment, well and truly to be made, said The National Surety Com-

pany of New York binds itself, its successors and assigns, jointly and severally firmly by these presents.

Sealed with the seal of said The National Surety Company of New York and dated this 9th day of May, 1919.

Now, whereas the above named The New York Central Railroad Company is prosecuting a writ of error to the Supreme Court of the United States, to reverse the order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, entered on the 6th day of May, 1919, whereby a judgment of the Court of Appeals of the State of New York, rendered April 8th, 1919, was made the judgment of said Appellate Division, a reversal of which judgment is likewise sought

Now, therefore, the condition of this obligation is such that
56 if the above named The New York Central Railroad Company shall prosecute its said writ to effect and, if it fail to make its plea good, shall answer all damages and costs, then this obligation shall be void; otherwise to remain in full force and virtue.

[L. S.] NATIONAL SURETY COMPANY OF NEW YORK, N. Y.,
By JAMES L. NOONAN, [L. S.]
Attorney in Fact.

Approved this — day of May, 1919, to act as a supersedeas.
LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

57 STATE OF NEW YORK,
City and County of Albany, ss:

On this 9th day of May, 1919, before me personally came James L. Noonan to me known, who, being by me duly sworn, did depose and say that he resided in the City of Albany; that he is the Attorney-in-Fact of the National Surety Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[L. S.] JOHN J. RYAN,
Notary Public, Albany County, N. Y.

58 Know all men by these presents, that the National Surety Company, a corporation duly organized and existing under the laws of the State of New York, and having its principal offices in the City of New York, hath made, constituted and appointed, and does by these presents make, constitute and appoint James L. Noonan of Albany, State of New York, its true and lawful attorney, with full power and authority hereby conferred in its name, place and stead to sign, execute and acknowledge any and all bonds not exceeding $50,000 each in amount, guaranteeing the fidelity of persons holding places of public or private trust; guaranteeing the performance of contracts other than insurance policies; guaranteeing the

performance of insurance contracts where surety bonds are accepted by States or Municipalities in lieu of actual deposits; and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law required, and to bind the National Surety Company thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the common seal of the Company, and duly attested by its Secretary, hereby ratifying and confirming all the acts of said attorney pursuant to the power herein given. This power of attorney is made and executed pursuant to and by authority of the following by-law adopted by the Board of Directors of the National Surety Company at a meeting duly called and held on the Second day of February, 1909.

"Article XII. Resident Officers and Attorneys-in-Fact.

"Section 1. The President, First Vice-President or any other Vice-President may from time to time "appoint Resident Vice-Presidents, " Resident Assistant Secretaries and Attorneys-in-Fact to represent " and act for and on behalf of the Company, and either the President, " First Vice-President, or any other Vice-President, the Board of " Directors or the Executive Committee may at any time remove any " such Resident Vice-President, Resident Assistant Secretary or " Attorney-in-Fact and revoke the power and authority given him.

"Section 4. Attorneys-in-Fact. Attorneys-in-Fact may be given full power and authority to execute for "and in the name and on " behalf of the Company, any and all bonds, recognizances, contracts " of indemnity and other writings obligatory in the nature of a bond, " recognizance or conditional undertaking, and any such instrument " executed by any such Attorney-in-Fact shall be as binding upon the " Company as if signed by the President and sealed and attested by " the Secretary."

And, at a meeting of the Board of Directors of the National Surety Company, duly called and held on the Seventh day of March, A. D. 1912, a quorum being present, the following additional section to the foregoing By-Law was adopted:

"Section 6. Attorneys-in-Fact. Attorneys-in-Fact are hereby authorized to verify any affidavit required to "be attached to bonds, " recognizances or contracts of indemnity, policies of insurance and " all other writings obligatory in the nature thereof, and are also " authorized and empowered to certify to a copy of any By-Law " contained in Articles VI, XII and XIII of the By-Laws of the " Company."

In witness whereof, the National Surety Company has caused these presents to be isgned by its President and its corporate seal to be hereto affixed, duly attested by it Assistant Secretary, this eleventh day of November, A. D. 1916.

NATIONAL SURETY COMPANY,
By WM. B. JOYCE, *President.*

Attest:
M. CROOKE,
Assistant Secretary.

STATE OF NEW YORK,
County of New York, ss:

On this eleventh day of November, A. D. 1916, before me personally came Wm. B. Joyce, to me known, who, being by me duly sworn, did dispose and say that he resides in the City of New York; that he is the President of the National Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[Seal National Surety Company, New York, Incorporated 1897.]

WM. M. WEAVER,
Notary Public.

STATE OF NEW YORK,
County of New York, ss:

I, M. Crooke, Assistant Secretary of the National Surety Company, do hereby certify that the above and foregoing is a true and correct copy of a power of attorney, executed by said National Surety Company, which is still in full force and effect.

In witness whereof, I have hereunto set my hand and affixed the seal of said Company, at the City of New York, this 25th day of January, A. D. 1919.

M. CROOKE,
Assistant Secretary.

59 National Surety Company of New York.

Financial Statement, December 31st, 1918.

Wm. B. Joyce, President. Hubert J. Hewitt, Secretary.

Assets.

Cash in Bank and Offices	$811,293.00
Liberty Bonds	3,112,431.98
Other Government, Municipal and Industrial Bonds, and Stocks (Cost Price)	11,030,840.24
Real Estate, Mortgages and Collateral Loans	246,645.56
Unpaid Premiums	1,578,776.35
Accrued Interest and Accounts Receivable	536,770.41
Total	$17,316,757.54

Liabilities.

Unearned Premium Reserve	$3,536,076.72
Contingent Claim and Expense Reserve (Less Reinsurance)	1,863,969.98
Reserve for Premiums over 90 Days Past Due	314,281.77
Reserve for taxes and Unpaid Commissions (not due)	572,493.26
*Reserve for Depreciation from Cost of Securities	775,136.26
Accounts Payable and Expenses Incurred (not due)	1,126,933.04
Dividends Declared (Payable January 2nd, 1919)	120,000.00
Capital Stock	4,000,000.00
Surplus	5,007,866.51
Total	$17,316,757.54

STATE OF NEW YORK,
County of New York, ss:

M. Crooke, being duly sworn, says: That he is Assistant Secretary of the National Surety Company, that said Company is a Corporation duly organized, existing, and engaged in business as a Surety by virtue of the Laws of the State of New York, and has duly complied with all the requirements of the Laws of said State and of the Laws of the State of New York applicable to said Company, and is duly qualified to act as Surety under such Laws; that said Company has also complied with and is duly qualified to act as Surety under the Act of August 13, 1894, entitled, "An Act Relative to Recognizances, Stipulations, Bonds and Undertakings, and To Allow Certain Corporations To be Accepted As Surety Thereon," as amended by the Act of Congress of March 23, 1910. That the foregoing is a full true and correct statement of the financial condition of said Company on the 31st day of December, 1918.

[Seal National Surety Company, New York, Incorporated 1897.]

M. CROOKE,
Assistant Secretary.

Sworn to before me this 25th day of January, 1919.

[Seal Wm. M. Weaver, Notary Public, New York County.]

WM. M. WEAVER,
Notary Public for New York County, No. 23.

*NOTE.—Securities valued on basis determined by National Convention of Insurance Commissioners.

Certificate filed in Kings, No. 1 Nassau, Queens, No. 468.
Bronx No. 2, Richmond & Westchester Counties.
New York County Register's Office No. 10009.
Kings County Register's Office No. 101.
Bronx County Register's Office No. 203.
My commission expires March 30, 1920.

60 [Endorsed:] (Copy.) Supreme Court of the United States. The New York Central Railroad Company, Plaintiff-in-Error, against Michael Bianc, Defendant-in-Error. Supersedeas Bond. Robert E. Whalen, of Counsel for Plaintiff-in-error, Office and Post Office Address, 126 State Street, Albany, N. Y.

61 [Endorsed:] Original. Supreme Court, Appellate Division, Third Department. In the Matter of the Claim, &c., made by Michael Bianc, Employee, Respondent, against The New York Central Railroad Company, Employer and Self-Insurer, Appellant. Certificate of Lodgment. Visscher, Whalen & Austin, Attorneys for Appellant, Office and Post-Office Address, 126 State Street, Albany, N. Y.

62 Supreme Court of the United States.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-error,

against

MICHAEL BIANC, Defendant-in-error.

Prayer for Reversal.

To the Supreme Court of the United States:

Comes now The New York Central Railroad Company, plaintiff-in-error, and prays for a reversal of the order of the Supreme Court of the State of New York herein entered in the office of the Clerk of the Appellate Division thereof, in the Third Judicial Department of said State on the 6th day of May, 1919, affirming a decision and award of the State Industrial Commission of said State, a reversal of which is likewise prayed, entered on the 8th day of April, 1918; and plaintiff-in-error further prays for a reversal of a judgment of the Court of Appeals of state State, rendered on the 8th day of April, 1919, upon which said order hereinbefore first mentioned was entered.

And your petitioner will ever pray.
Dated, May 9th, 1919.

ROBERT E. WHALEN,
Of Counsel for the New York Central Railroad Company.

63 Supreme Court of the United States.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-error,

against

MICHAEL BIANC, Defendant-in-error.

Petition for Writ of Error.

To the Supreme Court of the United States and to the Honorable Justices thereof:

The petition of The New York Central Railroad Company, a corporation organized and incorporated by agreement of consolidation bearing date April 29th, 1914, and recorded in the office of the Secretary of State of the State of New York December 22nd, 1914, respectfully shows:

First. On or about the 17th day of November, 1917, the above named Michael Bianc commenced before the State Industrial Commission of the State of New York a special proceeding against your petitioner and therein alleged:

(*a.*) That said Michael Bianc, at about ten o'clock in the forenoon of December 18th, 1916, while employed as a machinist's helper by your petitioner in its roundhouse at West Albany, New York, was working under a locomotive which slipped back against a kerosene torch, with the result that his clothes were set afire.

(*b.*) That consequent burns to the head, limbs and body of said Michael Bianc disabled him from working for all but ten days of the period from the date of said accident to the 14th day of December, 1917, for which loss of earning power he claimed, in accordance

64 with the provisions of Chapter 41 of the Laws of 1914 of the State of New York, commonly known as the Workmen's Compensation Law, compensation, which said State Industrial Commission thereafter awarded to said Michael Bianc in the amount of Four hundred thirty-three Dollars and forty-four Cents ($433.44), which your petitioner has tendered.

(*c.*) That, by reason of such burns, said Michael Bianc had also sustained "serious facial and head disfigurement," for which he claimed a further allowance, which said State Industrial Commission made to him in the sum of Fifteen hundred Dollars ($1500.00), by virtue of the amendment, made by Chapter 622 of the Laws of 1916 of the State of New York, to Subdivision 3 of §15 of said Workmen's Compensation Law, whereby "in case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars."

Second. In said proceeding before said commission your petitioner appeared and contended that to make to said Michael Bianc any award for facial or head disfigurement, under the provisions of said

amendment to Subdivision 3 of §15 of said Workmen's Compensation Law, would be tantamount to making an award not for loss of earning power, but for damages, and would, therefore, deprive your petitioner of its property without due process of law, in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Third. The written decision and award which said State Industrial Commission, after hearing the allegations and proofs of the parties, entered on the 8th day of April, 1918, overruled the contention of your petitioner specified in paragraph Second of this
65 petition, but contained no finding that said facial and head disfigurement had in any wise impaired the earning capacity of said Michael Bianc, to whom said decision and award decreed that your petitioner pay for compensation said sum of $433.44, and for said facial and head disfigurement the said further sum of $1,500.00.

Fourth. From said decision and award of said State Industrial Commission your petitioner duly appealed to the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, where, upon the argument of said appeal which duly came on to be heard, your petitioner, through its counsel, duly urged against the validity of said award of $1,500.00 for said facial and head disfigurement the contention hereinbefore specified in paragraph Second of this petition, but said Appellate Division of the Supreme Court overruled said contention and, by an order bearing date November 12th, 1918, and entered in the office of the Clerk of said Appellate Division on the 19th day of November, 1918, said Appellate Division wholly affirmed said decision and award of said commission so entered on the 8th day of April, 1918.

Fifth. From said order of said Appellate Division your petitioner duly appealed to the Court of Appeals of the State of New York, which was and is the highest court of said state in which could be had a decision of the question so raised by said contention of your petitioner hereinbefore specified in paragraph Second of this petition, and which contention your petitioner, through its counsel, duly urged upon the argument of said appeal to the Court of Appeals of the State of New York which duly came on to be heard. But said Court of Appeals overruled said contention of your petitioner and,
66 by its judgment rendered April 8th, 1919, said Court of Appeals affirmed said order of said Appellate Division of the Supreme Court, to which said Court of Appeals sent down its remittitur, consisting of a copy of the said judgment of said Court of Appeals and of the papers upon which said Court of Appeals made its said judgment, and said remittitur was filed on the 9th day of April, 1919, in the office of the Clerk of said Appellate Division where said remittitur now remains of record. Upon said remittitur a final order, reexamination and reversal of which by this court your petitioner seeks, was entered on the 6th day of May, 1919, in the office of the Clerk of said Appellate Division, whereby the said judgment of the Court of Appeals herein became the order of said Appellate Division, and the sum of Ninety-nine Dollars and fifty Cents

($99.50), costs of said appeal to said Court of Appeals, was awarded against your petitioner.

Sixth. In said judgment of the Court of Appeals, as well as in said final order thereon so entered on the 6th day of May, 1919, in the office of the Clerk of said Appellate Division, there was drawn in question the validity of a statute of the State of New York, to wit, said amendment made by said Chapter 622 of the Laws of 1916 to Subdivision 3 of §15 of said Workmen's Compensation Law, upon the ground of the repugnancy of said statute to the due process clause of the Fourteenth Amendment to the Constitution of the United States, but the decision was in favor of the validity of such statute.

Seventh. By virtue of the provisions of said Workmen's Compensation Law said State Industrial Commission, which is now composed of John Mitchell, Edward P. Lyon, James M. Lynch,
67 Henry D. Sayer and Frances E. Perkins, appeared by the Attorney General of the State of New York both in said Appellate Division and in said Court of Appeals, in support of the validity of said statute thus brought up for review by said appeals.

Wherefore, your petitioner prays that a writ of error may be allowed and issued directed to the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, commanding said Appellate Division to send to the Supreme Court of the United States the record of all and singular the record and papers in said special proceeding and for citation and supersedeas to stay execution, to the end that the errors of which your petitioner complains herein and in the assignment of errors herein filed may be reviewed and, if errors be found, corrected conformably to the Constitution and Laws of the United States.

And your petitioner will ever pray.

Dated, May 9th, 1919.

THE NEW YORK CENTRAL RAILROAD COMPANY,
By ROBERT E. WHALEN, *Counsel.*

68 STATE OF NEW YORK,
City and County of Albany, ss:

Robert E. Whalen, being duly sworn, deposes and says that he is the regularly retained counsel for the petitioner, The New York Central Railroad Company, in this proceeding. That he has read the foregoing petition, the contents whereof he knows to be true. That the reason why this verification is made by deponent is that said petitioner is a corporation, none of whose officers resides or is within the County of Albany, State of New York, where deponent resides and has his place of business. ROBERT E. WHALEN.

Subscribed and sworn to before me this 9th day of May, 1919.

[Seal Edith L. Jones, Albany County, N. Y.]

EDITH L. JONES,
Notary Public, Albany County, N. Y.

69 Supreme Court of the United States.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-error,

against

MICHAEL BIANC, Defendant-in-error.

Assignment of Errors.

Comes now The New York Central Railroad Company, plaintiff-in-error, and makes and files this its assignment of errors:

The Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, in its order entered May 6th, 1919, whereby the judgment of the Court of Appeals of the State of New York, rendered April 8th, 1919, was made the judgment of said Appellate Division, erred, as did also said Court of Appeals and the State Industrial Commission of the State of New York, in overruling the contention of your petitioner that to make to said Michael Bianc an award in this proceeding for facial and head disfigurement, under the amendment made by Chapter 622 of the Laws of 1916 of the State of New York to Subdivision 3 of §15 of the Workmen's Compensation Law of said state, would deprive your petitioner of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

Dated, May 9th, 1919.

ROBERT E. WHALEN,
Of Counsel for the New York Central Railroad Company.

70 [Endorsed:] (Original.) Supreme Court of the United States. The New York Central Railroad Company, Plaintiff-in-Error, against Michael Bianc, Defendant-in-Error. Prayer for Reversal, Petition for Writ of Error, and Assignment of Errors. Robert E. Whalen, of Counsel for Plaintiff-in-Error, Office and Post Office Address, 126 State Street, Albany, N. Y.

71 UNITED STATES OF AMERICA, *ss*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court, Appellate Division, in and for the Third Judicial Department of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, Appellate Division, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Michael Bianc and The New York Central Rail-

road Company, wherein was drawn in question the validity of a treaty or statute of, or an authority e ercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repug-
72 nant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said The New York Central Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourteenth day of May, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States, October Term, 1918. The New York Central Railroad Company, Plff. in Error, vs. Michael Bianc. Writ of Error.

73 UNITED STATES OF AMERICA, *ss:*

To Michael Bianc, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court, Appellate Division, in and for the Third Judicial Department of the State of New York, wherein The New York Central Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, this fourteenth day of May, in the year of our Lord one thousand nine hundred and nineteen.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

Due and personal service of a copy of the within Citation is hereby admitted this 16th day of May, 1919.

CHARLES D. NEWTON,
(E. C. A.),
Attorney General of the State of New York.

Endorsed on cover: File No. 27,125. New York Supreme Court, Appellate Division, 3d Judicial Department. Term No. 1039. The New York Central Railroad Company, plaintiff in error, vs. Michael Bianc. Filed May 21st, 1919. File No. 27,125.

Office Supreme Court, U. S.
FILED
MAY 28 1919
JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES.

NEW YORK CENTRAL RAILROAD COMPANY
Plaintiff-in-Error

against

MICHAEL BIANC No. [redacted] 374
Defendant-in-Error

AMERICAN KNIFE COMPANY
and
AETNA LIFE INSURANCE COMPANY
Plaintiffs-in-Error

against

GEORGE SWEETING No. [redacted] 37[redacted]
Defendant-in-Error

CLARK KNITTING COMPANY
and
AETNA LIFE INSURANCE COMPANY 376
Plaintiffs-in-Error

against

ELIZABETH VAUGHN No. [redacted]
Defendant-in-Error

MOTION TO ADVANCE

CHARLES D. NEWTON
Attorney General

E. C. AIKEN
Deputy Attorney General
of Counsel for the State Industrial Commission

IN THE

SUPREME COURT OF THE UNITED STATES

NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff-in-Error,

against

MICHAEL BIANC,
Defendant-in-Error.

AMERICAN KNIFE COMPANY and AETNA LIFE INSURANCE COMPANY,
Plaintiffs-in-Error,

against

GEORGE SWEETING,
Defendant-in-Error.

CLARK KNITTING COMPANY and AETNA LIFE INSURANCE COMPANY,
Plaintiffs-in-Error,

against

ELIZABETH VAUGHN,
Defendant-in-Error.

SIRS.— Please take notice that a motion will be made at a session of this court appointed to be held on the second day of June, 1919, at 12 o'clock noon, or as soon thereafter as counsel can be heard, to advance the hearing and argument of the appeals in the above causes, and for such other relief as may be proper.

Dated, Albany, N. Y., May 23, 1919.

CHARLES D. NEWTON,
Attorney-General,
Attorney for the State Industrial Commission,
Capitol, Albany, N. Y.

E. C. AIKEN,
Deputy Attorney-General,
of Counsel.

To:

VISSCHER, WHALEN & AUSTIN, Esqs.,
Attorneys for Plaintiff-in-Error, Ny C. R.R. Co
~~Michael Biane~~,
Office and Postoffice address,
Albany, N. Y.

WILLIAM H. FOSTER, Esq.,
Attorney for American Knife Co. and Aetna Life Insurance Co. and Clark Knitting Co. and Aetna Life Insurance Co.
Office and Postoffice address,
Syracuse, N. Y.

NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff-in-Error,

against

MICHAEL BIANC,
Defendant-in-Error.

AMERICAN KNIFE COMPANY and AETNA LIFE INSURANCE COMPANY,
Plaintiffs-in-Error,

against

GEORGE SWEETING,
Defendant-in-Error.

CLARK KNITTING COMPANY and AETNA LIFE INSURANCE COMPANY,
Plaintiffs-in-Error,

against

ELIZABETH VAUGHN,
Defendant-in-Error.

Now comes the State Industrial Commission, representing the defendants-in-error, and moves this court to advance these causes on the docket of this court.

STATEMENT AND REASONS FOR ADVANCEMENT.

These causes are now pending in this court on writs of error allowed by Mr. Justice Brandeis.

Said State Industrial Commission is charged under the statutes of the State of New York with the administration of the Workmen's Compensation Law in said State, and by the said law is made a party to all proceedings upon appeal in matters decided by it.

That in the above-entitled matters, in each case, an award was made for facial disfigurement; in the case of Michael Bianc of $1,500.00, in the case of George Sweeting of $2,500.00, and in the case of Elizabeth Vaughn of $3,500.00; that said awards were made under an amendment to the Workmen's Compensation added by chapter 622 of the Laws of 1916 of the State of New York, which provides as follows:

> "In case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars."

That the plaintiffs-in-error in the above matters have challenged the said awards on the ground that the amendment to the Workmen's Compensation Law is unconstitutional; that said matters were duly argued upon appeal at the Appellate Division of the Supreme Court of the State of New York and also the Court of Appeals, in both of which courts said awards were affirmed and the said plaintiffs-in-error have sued out a writ

of error to review said decisions, which writ of error is dated the 14th day of May, 1919.

That in addition to these three cases there are at present pending three other cases involving the same question, pending on appeal besides other cases awaiting decision, which cannot be decided until a hearing and decision by this court of these three cases brought up by writ of error; that in addition to the cases now pending there will undoubtedly be other cases which may arise prior to the determination herein and it is very important for this reason that the law should be settled by this court at an early date so that there may be a due administration of the Workmen's Compensation Law in the State of New York; that most of the claimants for compensation are men or women depending upon their wages and with very limited means, and it is, therefore, very desirable to have an early decision. The decision of this court will also affect states other than the State of New York which have laws allowing damages for facial disfigurement.

CHARLES D. NEWTON,
Attorney-General.

E. C. AIKEN,
of Counsel,
for the State Industrial Commission.

NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff-in-Error.

against

MICHAEL BIANC,
Defendant-in-Error.

AMERICAN KNIFE COMPANY and AETNA LIFE INSURANCE COMPANY,
Plaintiffs-in-Error,

against

GEORGE SWEETING,
Defendant-in-Error.

CLARK KNITTING COMPANY and AETNA LIFE INSURANCE COMPANY,
Plaintiffs-in-Error,

against

ELIZABETH VAUGHN,
Defendant-in-Error.

Now comes the New York Central Railroad Company, represented by Visscher, Whalen & Austin, and American Knife Company and Aetna Life Insurance Company, Clark Knitting Com-

pany and Aetna Life Insurance Company, represented by William H. Foster, and all represented by Robert E. Whalen, as counsel, and on motion to advance these causes concurs with the counsel for the State Industrial Commission.

VISSCHER, WHALEN & AUSTIN,
Attorneys for the New York Central Railroad Co., Plaintiff-in-Error.

WILLIAM H. FOSTER,
Attorney for American Knife Company and Aetna Life Insurance Company, Clark Knitting Company and Aetna Life Insurance Company.

ROBERT E. WHALEN,
Of counsel for all of the Plaintiffs-in-Error.

BRIEF OF PLAINTIFF-IN-ERROR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 374.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff-in-error.

against

MICHAEL BIANC.

In error to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York.

Statement of the Case.

This case involves (Transcript, p. 38) the constitutionality, under the due process clause of the Fourteenth Amendment to the Constitution of the United States, of the so-called "beauty-clause" which, added by chapter 622 of the Laws of 1916 of the State of New York to subdivision 3 of § 15 of the New York Workmen's Compensation Law, provides that "in case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars."

So much of the New York Workmen's Compensation Law, thus amended, as is deemed necessary to the decision of this cause, is annexed to this brief as Appendix "A" thereof (p. 17, *infra*).

Section 19, added to Article I of the Constitution of the State of New York in 1913, effective January 1, 1914, is annexed to this brief as Appendix "B" thereof (p. 33, *infra*). It is also printed in full in 243 U. S., at pp. 195-196.

This proceeding was commenced by claimant, defendant-in-error, before the State Industrial Commission of the State of New York, a Commission established by the Workmen's Compensation Law, by presentation of a claim to recover "compensation for disability" (Transcript, p. 2), alleged to have resulted from burns of the head, limbs and body while he was employed in a roundhouse of plaintiff-in-error.

There were no pleadings before the Commission which made to claimant on December 19, 1917, an award of "$433.44 for 48 weeks' disability at $9.03 per week." (Transcript, pp. 5, 8, 16.) On January 9, 1918, however, the Commission rescinded that award, because of the desire of claimant to commence against plaintiff-in-error an action under the Federal Employers' Liability Act. (Transcript, p. 6.)

Claimant thereafter changed his mind again and decided not to commence an action under the Federal Employers' Liability Act, but to look to the Industrial Commission for an allowance for disfigurement under the so-called "beauty clause." (Transcript, pp. 9, 11.) Accordingly, on April 8, 1918, the Commission reopened the case and held a further hearing at which the employer, in addition to objections on non-Federal grounds, interposed the following objection to the rendition of any award to claimant for facial or head disfigurement (Transcript, p. 15):

> "That to make to the claimant herein any award for facial or head disfigurement, under the provisions of § 15 of the Workmen's Compensation Law, will be tantamount to making

> an award not for loss of earning power, but for damages, and will, therefore, deprive said employer of its property without due process of law, in contravention of the provisions of the Fourteenth Amendment to the Federal Constitution."

The Commission, however, overruled the objection and on the same day made its "decision and award" (Transcript, p. 17), as the statute designates the determination of the Commission whereby, in addition to a reinstatement of the earlier award of compensation for forty-eight weeks, it was also provided (Transcript, p. 18):

> "Award of compensation is further made against New York Central Railroad Co., Employer and Self-insurer, to Michael Bianc in the sum of $1,500 account of and in view of the serious facial and head disfigurement resulting from the injuries sustained on December 18, 1916."

The Appellate Division of the Supreme Court, in the Third Judicial Department, unanimously and without opinion, affirmed the decision and award of the Commission. (Transcript, pp. 20-21, 23.) On further appeal taken to the Court of Appeals, the Appellate Division's order of affirmance was in turn affirmed (226 N. Y., 585), on the authority of *Matter of Sweeting v. American Knife Co.* (226 N. Y., 199), decided on the same day. (Transcript, p. 24.) The opinions in the Court of Appeals are also printed at pp. 30-33 of the Transcript of Record in the *Sweeting* case, which is No. 375 upon the docket of the present term of this court.

The Court of Appeals sent down its remittitur to the Appellate Division, to which the writ of error from this court is directed. (Transcript, pp. 25, 30.)

Specification of Error.

Plaintiff-in-error contends that the Court of Appeals, as also the Appellate Division and the State Industrial Commission, erred in not holding that to make to defendant-in-error an award for facial or head disfigurement, under the provisions of section 15 of the Workmen's Compensation Law, would deprive plaintiff-in-error of its property without due process of law, in contravention of the provisions of the Fourteenth Amendment to the Federal Constitution.

Argument.

Statement of Facts.

On December 18, 1916, at ten o'clock in the forenoon, claimant, employed by the railroad as a machinist's helper in its roundhouse at the West Albany Shops, was working under a locomotive which slipped back against a kerosene torch, with the result that claimant's clothes were set afire. (Transcript, pp. 2, 17.) Consequent burns to claimant's head, limbs and body disabled him from working for all but ten days of the period from the date of the accident to December 14, 1917, and it is for the earning power thus lost that the award of $433.44 has been made and tendered. (Transcript, pp. 7, 17, 18, 35.)

By reason of such burns, claimant also sustained "serious facial and head disfigurement," for which the Commission has awarded him $1,500. (Transcript, pp. 7, 17, 18.)

"The nature of said disfigurement consists of an extensive scar over the entire occipital region of the head, with loss of hair in consequence of the destruction of all hair follicles, and as a result of serious burns to both ears there is a marked external visible defect of each ear, due to the defective scars following the destruction of the tissues of

the ear shell, and both ears are badly shrivelled." (Transcript, p. 18.)

The record is devoid of finding, testimony or even allegation that claimant's disfigurement has diminished his earning power for a longer period than that for which the statutory compensation of $433.44 has been made, or that it has rendered him any less eligible for employment. No fault on the part of employer, as a cause of claimant's mishap, is charged, established or found.

POINT I.

The additional award of $1,500.00 for disfigurement deprives the employer, without fault, of its property without due process of law.

1. *Such additional award is wholly unrelated to claimant's ability to work.*

There is not the slightest intimation in the attending physician's report (Transcript, pp. 3-4), or in the report of the medical examiner (Transcript, pp. 4-5), or in the report of the medical bureau (Transcript, pp. 14-15), or in the findings (Transcript, pp. 17-18) that the disfigurement has impaired claimant's earning capacity beyond the period of forty-eight weeks for which he was awarded $433.44, which was made for the entire period of claimant's disability (Transcript, pp. 5, 7, 16, 18). Moreover, when that award of $433.44 was made, plaintiff had returned to work (Transcript, pp. 10, 11-12).

Before the Commission the employer distinctly objected to the rendition of any award for disfigurement that had no relation to the claimant's earning capacity (Transcript, pp. 9, 11, 12).

2. *Only impairment of earning power justifies compulsory payment of workmen's compensation for disabling or fatal injuries inflicted without fault.*

The following excerpts from the opinion of this court in *New York Central R. R. Co. v. White* (243 U. S., 188) emphasize the stress placed upon the *compensatory* feature of the New York Workmen's Compensation Law as sustaining the validity of that statute, enacted in exercise of the police power, against the contention that it violated the due process clause of the Fourteenth Amendment (italics ours):

> "Compensation under the act is not regulated by the measure of damages applied in negligence suits, but in addition to providing medical, surgical, or other like treatment, *it is based solely on loss of earning power*, being graduated according to the average weekly wages of the injured employee and the character and duration of the disability, whether partial or total, temporary or permanent." (P. 193.)
>
> "Under the present system the injured workman is left to bear the greater part of industrial accident loss, which because of his limited income he is unable to sustain, so that *he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity.*" (P. 197.)
>
> "The physical suffering must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another, and the statute makes no attempt to afford an equivalent in compensation. But, besides, *there is the loss of earning power*, a loss of that which stands to the employee as his capital in trade. This is a loss arising out of the business, and, however, it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasou-

able for the State, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the *loss of earning power* incurred in the common enterprise, irrespective of the question of negligence, *instead of leaving the entire loss to rest* where it may chance to fall — that is, *upon the injured employee or his dependents.*" (Pp. 203-204.)

"*The pecuniary loss* resulting from the employee's death or disablement must fall somewhere." (P. 205.)

"The subject-matter in respect of which freedom of contract is restricted is the matter of *compensation for human life or limb lost or disability incurred* in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare." (P. 206.)

In *Mountain Timber Co. v. Washington* (243 U. S., 219), similar emphasis was placed by this court upon the *compensatory* design of the Washington Compensation Law, likewise sustained as not violative of the due process guaranty (Italics ours):

"Sure and certain *relief for workmen,* injured in extra hazardous work, *and their families and dependents* is hereby provided." (P. 228, quoting from the first section of the Washington Act.)

"The States are not prevented by the Fourteenth Amendment, while relieving employers from liability for damages measured by common-law standards and payable in cases where they or others for whose conduct they are answerable are found to be at fault, from requiring them to contribute reasonable amounts and according to a reasonable and definite scale by way of *compensation for the loss of earning power* arising from accidental injuries to their employees, irrespective of the question

of negligence, instead of leaving the entire loss to rest where it may chance to fall, that is, upon particular injured employees and *their dependents*." (P. 236.)

"Certainly the operation of industrial establishments that in the ordinary course of things frequently and inevitably produce *disabling or mortal injuries* to the human beings employed is not a matter of wholly private concern." (P. 239.)

"We are clearly of the opinion that a State, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce *personal injuries and disability with consequent loss of earning power* among the men and women employed, *and occasionally, loss of life of those who have wives and children or other relations dependent upon them for support*, and may require that these human losses shall be charged against the industry." (P. 243.)

This court has pointed out that "compensation for disabling and fatal injuries irrespective of the question of fault" was involved in the decisions of the cases which sustained the New York and the Washington Acts.

Middleton v. Texas Power and Light Co., 249 U. S., 152, 163.

Mr. Justice PITNEY, writing for the majority of this court in *Arizona Copper Co., Ltd. v. Hammer*, decided June 9th, 1919, and not yet officially reported, at the middle of p. 8 of the pamphlet form of the opinion used for certification by the clerk, affirmed the power of the people of Arizona, through constitutional and legislative provisions, to erect safeguards against "leaving the injured ones, and the dependents of those whose lives are lost through accidents due to the conditions of the occupation,

to be a *burden upon the public.*" (Italics ours.) And at p. 10 of the same pamphlet he adverted to the sovereign power thus to regulate the conduct of those hazardous industries in which "human beings * * * in the pursuit of a livelihood must expose themselves to death or to physical injuries more or less disabling, with consequent impoverishment, partial or total, of the workman or those dependent upon him."

In *Ball v. Wm. Hunt & Sons, Ltd.* (1912) A. C. 496, cited at the bottom of page two of the clerk's pamphlet copy of Mr. Justice HOLMES' concurring opinion in the *Arizona Copper* case, and also cited by Judge POUND of the New York Court of Appeals in his concurring opinion in the case of *Sweeting* (Transcript of Record in No. 375, at p. 33), Lord SHAW of Dunfermline declared that "the theory and datum upon which such compensation proceeds is that of compensation for injury to the worker as a wage-earner, and it is the incapacity to earn a wage which forms the standard upon which the compensation is reckoned." (P. 507.)

Reparation for diminution or destruction of earning power being, then, the basis of constitutional sanction for compulsory payment of compensation, in the absence of fault on an employer's part, the award for disfigurement, under review herein, cannot stand.

At the top of each of pp. 9, 10 and 11 of the clerk's pamphlet copy of the opinion of Mr. Justice PITNEY in *Arizona Copper Co. Ltd. v. Hammer,* a feature of the Arizona Act which was considered to be an element of guaranty of due process was the provision therein for trial of issues of fact and assessment of damages before a constitutional jury, in a judicial tribunal, in accordance with long established modes and ordinary processes of law — "substantially the common law method." In the case at bar no such safeguard was vouchsafed to

the employer in the rendition of the award to the claimant for disfigurement. It is instructive to glean from the record the obvious design of the claimant to utilize the Industrial Commission as a jury. After obtaining the initial award of compensation for disability, which he persuaded the Commission to rescind so that he might sue under the Federal Employers' Liability Act, claimant once more recanted and appeared before the Commission in quest not only of compensation but also of damages. (Transcript, pp. 9, 10-11.) Due process of law, however, contemplates that damages, as distinguished from compensation for loss or diminution of earning power during hazardous employment, shall be fixed and awarded, if at all, by a jury and not by a board. That is to say, damages are to be assessed by a jury, rather than by a number of commissioners, be they one, two, three, four or five, who may chance to drift into or out of a hearing. Damages, when awarded, must represent the deliberate judgment of a tribunal vested with and exercising judicial functions, not the determination of a body which is clothed with statutory power to proceed as summarily as a court marshal. (§§ 20, 68, pp. 26 and 32, *infra*).

Quite recently the Federal Circuit Court of Appeals for the Second Circuit has drawn the following distinction between "compensation" under the Workmen's Compensation Law and "damages" under the Federal Employers' Liability Act:

> "It is the essential nature of any compensation act that it does not depend upon or is not invoked as the result of an act of negligence. What is assured to the workman thereby is not compensatory damages for a tort, but a species of insurance against hurts received in the line of occupation without (perhaps) anybody's fault. But § 1 of the Liability Act (35 Stat., 65) declares that common carriers shall be liable 'in damages' for the injuries due to

> their 'negligence.' These words refer to a course and habit of litigation only too well known for some generations and must be interpreted accordingly. Damages mean what juries assess according to their own views of value, and the act authorizing such damages supersedes all state laws relating to the same subject."
>
> Erie R. Co. v. Linnekogel, 248 Fed., 389, 392.

3. *The disfigurement clause is not a reasonable exercise of the police power.*

In upholding the New York Act as originally enacted, this court in *New York Central R. R. Co. v. White* (243 U. S., 188) said:

> "We recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the State. In our opinion it is fairly supportable upon that ground. And for this reason: The subject-matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. * * * This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations." (Pp. 206, 207.)

So, too, the Washington Act was sustained as a valid exercise of the authority of that State to enact such legislation as reasonably may be deemed to be necessary to promote the health, safety and general welfare of its people.

Mountain Timber Co. v. Washington,
243 U. S., 219, 238, 243.

The opinion of Mr. Justice PITNEY in *Arizona Copper Co. Ltd. v. Hammer,* at pp. 3-4 and at p. 5 of the clerk's pamphlet copy thereof, is addressed to consideration of the question whether the Arizona Act could be classified as legislation enacted in the public interest and reasonably designed to promote the general welfare.

Now, if, as recognized at p. 207 of the opinion of this court in *New York Central R. R. Co. v. White,* the New York Act is not, nor is it asserted to be, a measure in furtherance of health or safety, it remains simply to inquire whether the disfigurement clause under review has any reasonable relation to the general welfare. The question, it is submitted, carries its own answer, since, once adequate provision has been made for loss or diminution of earning capacity, it is of no public concern whether the claimant shall or shall not receive a further award for impairment of good looks not in any wise related to earning power.

4. *Hence, the clause in question is arbitrary and oppressive.*

Repeatedly it has been stated in cognate terms that the subject of judicial inquiry, in such a case as this, is whether the statute under consideration "is arbitrary and unreasonable, from the standpoint of natural justice" (*White* case, at p. 202); or "so extravagant or arbitrary as to constitute an abuse of power" (*Mountain Timber* case, at

p. 237.) Such was the test applied in determining the validity of the Arizona Act (clerk's pamphlet copy of Mr. Justice PITNEY's opinion, pp. 4, 5, 8, 9, 11).

There being no claim that any element of public health or of public safety is involved, and no real consideration of public welfare being presented, it follows that the clause in question, purporting to impose liability for disfigurement inflicted without fault is fairly to be characterized as unreasonable and fundamentally unjust.

POINT II.

The question here presented is an open one.

1. *It was not decided in the White or Mountain Timber cases.*

In sustaining the New York Act as originally enacted Mr. Justice PITNEY said:

> "It is important to be observed that the Act applies only to disabling or fatal personal injuries received in the course of hazardous employment in gainful occupation." (Pp. 202-203.)

In the *Mountain Timber* case "the matter of compensation for accidental injuries with resulting loss of life or earning capacity of men employed in hazardous occupations" (p. 239) was the subject of the act then before the court.

2. *It was not decided in the Arizona Copper cases.*

At the end of the first paragraph of the concurring opinion of Mr. Justice HOLMES, and again towards the bottom of p. 2 of the clerk's pamphlet

copy of that opinion, disfigurement is mentioned as an element of damage for which a recovery may be allowed under the Arizona Act, and in that connection passing reference is made to *Arizona Copper Co. v. Burciaga* (177 Pac. Rep., 29, 33). In that case, however, it does not appear that disfigurement had been suffered by the workman; nor does the opinion of the Supreme Court of Arizona discuss disfigurement as an element of damage.

Of the five cases, involving the Arizona Act, upon which this court passed on June 9, 1919, the *Mendez* case appears from the statement of facts in 19 Ariz., 151, to have involved injury to sight; the *Tomich* case appears from the statement of facts in 19 Ariz., 182, to have dealt with the loss of three fingers; and the *Veazey* case is not stated in the analysis thereof in the dissenting opinion of Mr. Justice McReynolds to have been a case of disfigurement. So far as counsel herein have been able to ascertain, the nature of the injuries in the cases of *Hammer* and of *Bray* has not been stated in any reported opinion.

3. *Neither the Ball case nor the Erickson case decided the question.*

In *Ball v. Wm. Hunt & Sons, Ltd.* (1912), A. C., 496, cited in the concurring opinion of Mr. Justice Holmes in the *Arizona Copper* cases, and also cited in the concurring opinion of Judge Pound of the New York Court of Appeals in the case of *American Knife Co. v. Sweeting*, argued herewith, the statement of facts discloses that those to whom claimant applied for work "refused to employ him on account of the fact that he had only one eye." (P. 497.) The opinion of Earl Loreburn states that claimant remained just as able to work after his injury, but because of his partial blindness could get

no work. (P. 499.) Lord ATKINSON declared that, though claimant's physical ability to work was the same, his recent accident had destroyed the market for his labour. (P. 501.) Later in his opinion he said:

> "On examining the schedule, one plainly sees that what is to be compensated for is not, as in ordinary actions of tort, the pain and suffering which the plaintiff has endured, or the disfigurement of, or injury to, his body which has been inflicted upon him, but the loss of the power to earn wages which has resulted from the injury. * * * If because of his apparent physical defects no one will employ him, however efficient he may be in fact, he has lost the power to earn wages as completely as if he was paralyzed in every limb." (Pp. 504, 505.)

Lord SHAW of Dunfermline said:

> "With regard to his power to do work, it remains as before; but with regard to his power to get work, that appears to have been lost, or at least diminished, and, up to the time of the trial, notwithstanding frequent applications in various quarters, he has been refused employment on account of the disfigurement above referred to." (P. 506.)

In *Matter of Erickson v. Preuss* (223 N. Y., 365), cited in the concurring opinion of Judge POUND of the New York Court of Appeals in the *Sweeting* case (Transcript in Sweeting case, p. 32-33), and cited also in the concurring opinion of Mr. Justice HOLMES in the *Arizona Copper* cases, no constitutional objection, on State or Federal grounds, was urged against the validity of the disfigurement clause. Rather, there was presented simply a question of statutory construction, namely, whether an award for disfigurement was within the contempla-

tion of the New York Legislature, where no diminution of earning capacity was involved.

POINT III.

So much of the judgment under review as sustains the additional award of $1,500.00 to claimant for disfigurement should be reversed, and this cause should be remanded for further proceedings not inconsistent with the decision of this court.

All of which is respectfully submitted.

Dated, October 13, 1919.

FRANK V. WHITING,
ROBERT E. WHALEN,
Of Counsel for Plaintiff-in-Error.

APPENDIX "A."

THE WORKMEN'S COMPENSATION LAW.

Chapter 816 of the Laws of 1913, as amended and re-enacted by chapter 41 of the Laws of 1914, constituting chapter 67 of the Consolidated Laws, as amended.

ARTICLE 1.

SHORT TITLE; APPLICATION; DEFINITIONS.

Section 1. Short title.—This chapter shall be known as the "workmen's compensation law."

§ 2. Application.— Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments:

Group 1. The operation, including construction and repair, of railways operated by steam, electric or other motive power, street railways, and incline railways, but not their construction when constructed by any person other than the company which owns or operates the railway, including work of express, sleeping, parlor and dining car employees on railway trains.

Group 2. Construction, repair and operation of railways not including group 1.

Group 3. The operation, including construction and repair, of car shops, machine shops, steam and power plants, and other works for the purpose of any such railway, or used or to be used in connection with it when operated, constructed or repaired by the company which owns or operates the railway.

* * * * * * * * * * *

§ 3. Definitions.—As used in this chapter. * * *

6. "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein * * *

9. "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer. * * *

12. "Insurance carrier" shall include the state fund, stock corporations or mutual associations with which employers have insured, and employers permitted to pay compensation directly under the provisions of subdivision three of section fifty. * * *

ARTICLE 2.

COMPENSATION.

* * * *

§ 10. Liability for compensation.—Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty. Where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty, neither the injured employee nor any dependent

of such employee shall receive compensation under this chapter.

§ 11. Alternative remedy.—The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

* * * * * * * * * *

§ 14. Weekly wages basis of compensation.—Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as a basis upon which to compute compensation or death benefits, and shall be determined as follows:

1. If the injured employee shall have worked in the employment in which he was working at the time of the accident, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hun-

dred times the average daily wage or salary which he shall have earned in such employment during the days when so employed;

2. If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed;

3. If either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied, such annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the accident;

4. The average weekly wages of an employee shall be one-fifty-second part of his average annual earnings. * * *

§ 15. Schedule in case of disability.—The following schedule of compensation is hereby established:

1. Total permanent disability. In case of total disability adjudged to be permanent, sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both

eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

2. Temporary total disability. In case of temporary total disability, sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance thereof, but not in excess of three thousand five hundred dollars, except as otherwise provided in this chapter.

3. Permanent partial disability. In case of disability partial in character but permanent in quality the compensation shall be sixty-six and two-thirds per centum of the average weekly wages and shall be paid to the employee for the period named in the schedule as follows:

Thumb. For the loss of a thumb, sixty weeks.

First finger. For the loss of a first finger, commonly called the index finger, forty-six weeks.

Second finger. For the loss of a second finger, thirty weeks.

Third finger. For the loss of a third finger, twenty-five weeks.

Fourth finger. For the loss of a fourth finger, commonly called the little finger, fifteen weeks.

Phalange of thumb or finger. The loss of the first phalange of the thumb or finger shall be considered to be equal to the loss of one-half of such thumb or finger, and compensation shall be one-half of the amount above specified. The loss of more than one phalange shall be considered as the loss of the entire thumb or finger; provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

Great toe. For the loss of a great toe, thirty-eight weeks.

Other toes. For the loss of one of the toes other than the great toe, sixteen weeks.

Phalange of toe. The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of said toe, and the compensation shall be one-half of the amount specified. The loss of more than one phalange shall be considered as the loss of the entire toe. * * *

Hand. The loss of a hand, two hundred and forty-four weeks.

Arm. For the loss of an arm, three hundred and twelve weeks.

Foot. For the loss of a foot, two hundred and five weeks.

Leg. For the loss of a leg, two hundred and eighty-eight weeks.

Eye. For the loss of an eye, one hundred and twenty-eight weeks.

Loss of use. Permanent loss of the use of a hand, arm, foot, leg, eye, thumb, finger, toe, or phalange, shall be considered as the equivalent of the loss of such hand, arm, foot, leg, eye, thumb, finger, toe or phalange. * * *

Amputations. Amputations between the elbow and the wrist shall be considered as the equivalent of the loss of a hand. Amputation between the knee and the ankle shall be considered as the equivalent of the loss of a foot. Amputation at or above the elbow shall be considered as the loss of an arm. Amputation at or above the knee shall be considered as the loss of the leg.

The compensation for the foregoing specific injuries shall be in lieu of all other compensation,

except the benefits provided in section thirteen of this chapter.

In case of an injury resulting in serious facial or head disfigurement the Commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars.

Other cases. In all other cases in this class of disability, the compensation shall be sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the Commission on its own motion or upon application of any party in interest.

4. Temporary partial disability. In case of temporary partial disability, except the particular cases mentioned in subdivision three of this section, an injured employee shall receive sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage earning capacity thereafter in the same employment or otherwise during the continuance of such partial disability, but not to exceed when combined with his decreased earnings the amount of wages he was receiving prior to the injury, and not to exceed in total the sum of three thousand five hundred dollars, except as otherwise provided in this chapter.

5. Limitation. The compensation payment under subdivisions one, two and four and under subdivision three except in case of the loss of a hand, arm, foot, leg or eye, shall not exceed fifteen dollars per week nor be less than five dollars per week; the compensation payment under subdivision three in case of the loss of a hand, arm, foot, leg

or eye, shall not exceed twenty dollars per week nor be less than five dollars a week; provided, however, that if the employee's wages at the time of injury are less than five dollars per week he shall receive his full weekly wages.

6. Previous disability. The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, provided, however, that an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability.

7. Permanent total disability after permanent partial disability. If an employee who has previously incurred permanent partial disability through the loss of one hand, one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed period of weeks special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to

compensation the sum of one hundred dollars. The state treasurer shall be the custodian of this special fund and the Commission shall direct the distribution thereof.

§ 16. Death benefits.—If the injury causes death, the compensation shall ke known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

1. Reasonable funeral expenses not exceeding one hundred dollars.

2. If there be a surviving wife (or dependent husband) and no child of the deceased under the age of eighteen years, to such wife (or dependent husband) thirty per centum of the average wages of the deceased during widowhood (or dependent widowerhood) with two years' compensation in one sum, upon remarriage; and if there be surviving child or children of the deceased under the age of eighteen years, the additional amount of ten per centum of such wages for each such child until of the age of eighteen years; in case of the subsequent death of such surviving wife (or dependent husband) any surviving child of the deceased employee, at the time under eighteen years of age, shall have his compensation increased to fifteen per centum of such wages, and the same shall be payable until he shall reach the age of eighteen years; provided that the total amount payable shall in no case exceed sixty-six and two-thirds per centum of such wages. The Commission may in its discretion require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement by the Commission the appointment of a guardian for such purposes shall not be necessary.

3. If there be surviving child or children of the deceased under the age of eighteen years, but no

surviving wife (or dependent husband) then for the support of each such child until of the age of eighteen years, fifteen per centum of the wages of the deceased, provided that the aggregate shall in no case exceed sixty-six and two-thirds per centum of such wages.

4. If there be no surviving wife (or dependent husband) or child under the age of eighteen years or if the amount payable to surviving wife (or dependent husband) and to children under the age of eighteen years shall be less in the aggregate than sixty-six and two-thirds per centum of the average wages of the deceased, then for the support of grandchildren or brothers and sisters under the age of eighteen years, if dependent upon the deceased at the time of the accident, fifteen per centum of such wages for the support of each such person until the age of eighteen years; and for the support of each parent, or grandparent, of the deceased, if dependent upon him at the time of the accident, twenty-five per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between sixty-six and two-thirds per centum of such wages, and the amount payable as hereinbefore provided to surviving wife (or dependent husband) or for the support of surviving child or children.

Any excess of wages over one hundred dollars a month shall not be taken into account in computing compensation under this section. All questions of dependency shall be determined as of the time of the accident.

* * * * * * * * * *

§ 20. Determination of claims for compensation.— At any time after the expiration of the first fourteen days of disability on the part of an injured employee, or at any time after his death, a

claim for compensation may be presented to the employer and if rejected or if within ten days after presentation, a report containing an agreement for compensation be not made and filed with the Commission as provided by this section, the claim may be presented to the Commission. The Commission shall have full power and authority to determine all questions in relation to the payment of claims presented to it for compensation under the provisions of this chapter. The Commission shall make or cause to be made such investigation as it deems necessary, and upon application of either party, shall order a hearing, and within thirty days after a claim for compensation is submitted under this section, or such hearing closed, shall make or deny an award, determining such claim for compensation, and file the same in the office of the Commission. The Commission may before making an award, require the claimant to appear before an arbitration committee appointed by it and consisting of one representative of employees, one representative of employers, and either a member of the Commission or a person specifically deputized by the Commission to act as chairman, before which the evidence in regard to the claim shall be adduced and by which it shall be considered and reported upon. Immediately after such filing the Commission shall send to the parties a copy of the decision. Upon a hearing pursuant to this section either party may present evidence and be represented by counsel. The decision of the Commission shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law. When a claim is presented to an employer, and the employer and employee, or in case of death, his principal dependent, enter into an agreement for the payment of compensation therefor pursuant to this chapter, a joint report of such claim containing such agreement shall be made to the Com-

mission upon a form prepared by it and signed by the employer and employee, or in case of death his principal dependent. The Commission shall examine such report and approve the same when the terms are strictly in accordance with this chapter and such approval shall constitute an award. However, the Commission may make an award in the manner provided in this section in any case, and if the terms of the award vary from the joint report, the employer shall comply with the award. In case of unfair dealing or of bad faith on the part of the employer under this section, the Commission may impose a penalty of not more than ten per centum of the award.

* * * * * * * * * *

§ 21. Presumptions.— In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary:

1. That the claim comes within the provisions of this chapter;

2. That sufficient notice thereof was given;

3. That the injury was not occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another;

4. That the injury did not result solely from the intoxication of the injured employee while on duty.

§ 22. Modification of award.— Upon its own motion or upon the application of any party in interest, on the ground of a change in conditions, the commission may at any time review any award, and, on such review, may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall state its

conclusions of fact and rulings of law, and shall immediately send to the parties a copy of the award. No such review shall affect such awards as regards any moneys already paid.

* * * * * * * * * * *

§ 25. Compensation, how payable.— Compensation under the provisions of this chapter shall be payable periodically by the employer, in accordance with the method of payment of the wages of the employee at the time of his injury or death, and shall be so provided for in any award; but the commission may determine that any payments may be made monthly or at any other period, as it may deem advisable. The state fund or insurance corporation in which an employer is insured shall, within ten days after demand by such employer and on the presentation of evidence of payment of compensation in accordance with this chapter, reimburse the employer therefor. An injured employee, or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall forward receipts therefor promptly to the commission. The commission, whenever it shall so deem advisable, may commute such periodical payments to one or more lump sum payments to the injured employee, or, in case of death, his dependents, provided the same shall be in the interest of justice.

* * * * * * * * * * *

§ 27. Depositing future payments.— If an award under this chapter requires payment of death benefits or other compensation by an insurance carrier or employer in periodical payments, the commission may, in its discretion, at any time, any provision of this chapter to the contrary notwithstanding, compute and permit or require to be paid into the state fund an amount equal to the

present value of all unpaid death benefits or other compensation in cases in which awards are made for total permanent or permanent partial disability for a period of one hundred and four weeks or more, for which liability exists, together with such additional sum as the commission may deem necessary for a proportionate payment of expenses of administering the fund so created. The moneys so paid in for all death benefits or other compensation to constitute one aggregate and indivisible fund; and thereupon such employer or insurance carrier shall be discharged from any further liability under such award and payment of the same as provided by this chapter shall be assumed by the special fund so created. All computations made by the commission shall be upon the basis of the survivorship annuitants' table of mortality, the remarriage tables of the Dutch Royal Insurance Institution and interest at three and one-half per centum per annum.

ARTICLE 3.

Security for Compensation.

§ 50. Security for payment of compensation.—An employer shall secure compensation to his employees in one of the following ways:

1. By insuring and keeping insured the payment of such compensation in the state fund, or

2. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state. If insurance be so effected in such a corporation or mutual association the employer shall forthwith file with the commission, in form prescribed by it, a notice specifying the name of such insurance corporation or mutual association

and such information regarding the policies as the commission may require.

3. By furnishing satisfactory proof to the commission of his financial ability to pay such compensation for himself, in which case the commission may, in its discretion, require the deposit with the commission of securities of the kind prescribed in section thirteen of the insurance law, in an amount to be determined by the commission, to secure his liability to pay the compensation provided in this chapter. * * * The commission shall have the authority to revoke its consent furnished under this section at any time for good cause shown.

If an employer fail to comply with this section, he shall be liable to a penalty during which such failure continues of an amount equal to the pro rata premium which would have been payable for insurance in the state fund for such period of noncompliance to be recovered in an action brought by the commission.

* * * * * * * * * *

§ 52. Effect of failure to secure compensation.— Failure to secure the payment of compensation shall constitute a misdemeanor and have the effect of enabling the injured employee, or in case of death, his dependents or legal representatives, to maintain an action for damages in the courts, as prescribed by section eleven of this chapter.

§ 53. Release from all liability.— An employer securing the payment of compensation by contributing premiums to the state fund shall thereby become relieved from all liability for personal injuries or death sustained by his employees, and the persons entitled to compensation under this chapter shall have recourse therefor only to the state fund and not to the employer. An employer

shall not otherwise be relieved from the liability for compensation prescribed by this chapter except by the payment thereof by himself or his insurance carrier.

ARTICLE 4.

State Workmen's Compensation Commission.

§ 68. Technical rules of evidence or procedure not required.— The commission or a commissioner or deputy commissioner in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties.

* * * * * * * * * *

§ 74. Jurisdiction of commission to be continuing.— The power and jurisdiction of the commission over each case shall be continuing, and it may, from time to time, make such modification or change with respect to former findings or orders relating thereto, as in its opinion may be just.

ARTICLE 6.

Miscellaneous Provisions.

§ 118. Unconstitutional provisions.— If any section or provision of this chapter be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the chapter as a whole or any part thereof other than the part so decided to be unconstitutional or invalid.

APPENDIX "B."

AMENDMENT TO THE CONSTITUTION OF THE STATE OF NEW YORK.

Article I, § 19. Workmen's compensation.—"Nothing contained in this Constitution shall be construed to limit the power of the Legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a State or other system of insurance or otherwise, of compensation for injuries to employees, or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

Adopted by the people November 4, 1913; in effect January 1, 1914.

OCT 10 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 374.

NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff in error,

against

MICHAEL BIANC,
Defendant in error.

IN ERROR TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD DEPARTMENT.

CHARLES D. NEWTON,
Attorney-General.

E. C. AIKEN,
Deputy Attorney-General.

Of Counsel for the State Industrial Commission.

Brief for the State Industrial Commission

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. 374.

NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff-in-Error,

against

MICHAEL BIANC,
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK.

STATEMENT OF CASE

This is a writ of error to review a judgment of the Court of Appeals of the State of New York which affirmed an order of the Appellate Division, Third Department, unanimously affirming an award of the State Industrial Commission made to the claimant of forty-eight weeks' compensation from January 1, 1917, to December 14, 1917, and also the sum of $1,500 for serious facial and head disfigurement resulting from injuries sustained on December 18, 1916 (fol. 31). The claimant was a machinists' helper working at the West Albany shops of the defendant (fol. 2). While work-

ing under an engine, he slipped back against a kerosene torch, setting his clothes afire (fol. 3). He received severe burns on the back of his head and back, limbs and body (fols. 5, 6, 7). There seems to be no dispute as to the forty-eight weeks allowed for disability as this was conceded by the counsel for the defendant (fol. 13). Mr. Brown, counsel for the railroad, thought that award was about right (fol. 19). Question arose, however, upon the claim for facial disfigurement which the defendant contested, although there was no question but what there was such disfigurement. In addition to the facial disfigurement, the claimant has an extensive scar on the buttock which causes pain after prolonged sitting or in some movements of the right leg (fol. 18). Nothing, however, is included for this injury. The disfigurement to the face is described by the attending physician, Dr. Vander Veer (fol. 4) and by a special examiner, Dr. Boyle (fol. 7), also by Dr. Lewi (fol. 24). Dr. Vander Veer says that there is permanent disfigurement of the head and face. That both ears are distorted by burns fol. 4). Dr. Boyle says that both ears show marks of deformity and that there is marked cosmetic disfigurement in the occipital region. The claimant was subject to a physical examination by the commissioners who found that the scars on the back of the head and neck have entirely denuded his head of hair, at least half way up his head in the rear, and that there are serious burns on both ears by which they are badly shriveled (fol. 21). It appears that the claimant's hearing is affected. That he can hear hardly anything in the morning (fol. 21).

ARGUMENT

POINT I

No valid Constitutional objection has been raised and the award for facial disfigurement was properly made.

The Workmen's Compensation Law of New York was thoroughly discussed before this court on argument and reargument, and considered in the case of *New York Central R. R. Company* v. *White*, 243 U. S. 188, and a very exhaustive opinion written by Mr. Justice Pitney and concurred in by the entire court.

The gist of that opinion was that the common law gave the workman compensation for damages when the employer was at fault. That that remedy was taken away and a remedy given for damages received, irrespective of fault; that the Legislature had the right to place such a burden upon the employer, providing the same was reasonable.

Since the decision of that case this court has on two occasions had to deal with Workmen's Compensation Laws of other states. In the case of *Middleton* v. *Texas Power & Light Company*, this court had the question raised by the employe that the Texas Employers Liability Act was in conflict with the due process and equal protection provisions of the Fourteenth Amendment. The court, through Mr. Justice Pitney, stated in reference to the compensation allowed under said statute:

> "Such compensation is the statutory substitute for damages otherwise recoverable because of injuries suffered by an employe, or his death occasioned by such injuries, when due to the negligence of the employer or his servants; it being declared that the employe of a subscribing employer, or his representatives or beneficiaries in case of his death, shall have no cause of action against the employer for damages except where a death is caused by the wilful act or omission or gross negligence of the employer."

Again in the case of *Arizona Copper Company* v. *Hammer*, this court had under consideration the Employers Liability Law and the Workmen's Compulsory Compensation Law of Arizona. The Employers' Liability Law of Arizona designated certain employments as inherently hazardous and dangerous to workmen, and imposed upon the employer, without regard to the question of fault, liability and compensatory damages for accidental personal injuries or death of an employee arising out of and in the course of the employment and due to the condition or conditions of the occupation, in cases where such injury of the employe shall not have been caused by his own negligence.

Regarding this law, the court, through Mr. Justice Pitney says:

> "We are unable to say that the Employers' Liability Law of Arizona, in requiring the employer in hazardous industries to assume — so far as pecuniary consequences go — the entire risk of injury to the employee attributable to accidents arising in the course of the employment, and due to its inherent

conditions, exceeds the bounds of permissible legislation, or interferes with the constitutional rights of the employer."

It is further stated:

"It is objected that the responsibility of the employer under this statute is unlimited; but this is not true except as it is true of every action for compensatory damages where the amount awarded varies in accordance with the nature and extent of the damages for which compensation is made. It is said that in actions by employees against employers juries are prone to render extravagant verdicts. The same thing has been said, and with equal reason, concerning actions brought by individuals against railroad companies, traction companies, and other corporations."

And further:

"The statute says to the employer, in effect: 'You shall not employ your fellowmen in a hazardous occupation for gain, you being in a position to reap a reward in money through selling the produce of their toil, unless you come under an obligation to make appropriate compensation in money in case of their death or injury due to the conditions of the occupation.' The rule being based upon reasonable grounds affecting the public interest, being established in advance, and applicable to all alike under similar circumstances, there is, in our opinion, no infringement of the fundamental rights protected by the 14th Amendment.

"Some expressions contained in our opinion in the *White Case* (243 U. S. 203–205) are treated in argument as if they were equivalent to saying that if a state, making a legis-

lative adjustment of employers' liability, departs from the common-law system of basing responsibility upon fault, it must confine itself to a limited compensation, measured and ascertained according to the methods adopted in the compensation acts of the present day. Of course nothing of the kind was intended. In a previous part of the opinion (pp. 196–200) it had been shown that the employer had no constitutional right to continued immuity from liability in the absence of negligence, nor to have the fellow-servant rule and the rules respecting contributory negligence and assumption of risk remain unchanged. The statutory plan of compensation for injured workmen and the dependents of those fatally injured — an additional feature at variance with the common law — was then upheld; but, of course, without saying that no other would be constitutional. For if, as we held in that case, the novel statutory scheme of awarding compensation according to a prearranged scale is sustainable, it follows, perhaps *a fortiori* that the Arizona method of ascertaining the compensation according to the facts of each particular case — substantially the common-law method — is free from objection on constitutional grounds. Indeed, if a state recognizes or establishes a right of action for compensation to injured workmen upon grounds not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law, or according to some prescribed scale reasonably adapted to produce a fair result, is for the state itself to determine. Where the compensation should be paid in a single sum after judgment recovered, as is required by the Arizona Employers' Liability Law just as under the common-law system in the case of a judgment

> based upon negligence, or whether it would be more prudent to distribute the award by instalment payments covering the period of disability or of need, likewise is for the state to determine, and upon this the plaintiffs in error can raise no constitutional question."

And Mr. Justice Holmes, in his concurring opinion also says:

> "But if it is thought to be public policy to put certain voluntary conduct at the peril of those pursuing it, whether in the interest of safety or upon economic or other grounds, I know of nothing to hinder. A man employs a servant at the peril of what that servant may do in the course of his employment, and there is nothing in the Constitution to limit the principle to that instance."

The argument of the plaintiff-in-error to the effect that an award for disfigurement deprives the employer of his property without due process of law should be turned about. If the employer's argument is sound, the employee is the one that is deprived of property without due process of law and not the employer. The employer contends, of course, that the Workmen's Compensation Law is constitutional and that it is intended to and does take the place exclusively of the remedy for negligence formerly existing against the railroad company for injuries received by its employees. (See *Shanahan* v. *Monarch Engineering Co.*, 219 N. Y. 469). Supposing, however, an employee receives an injury which does not disable him from working but removes say all the hair from his head or smashes his nose or cuts off his ears. If the employee sues the employer for this and it is a case where there is

negligence, the employer will reply that there is no remedy against the employee for the reason that the Workmen's Compensation Law is exclusive. The employee then petitions for compensation under the Workmen's Compensation Law and is met by the argument that the employer's property is taken without due process of law as there is no diminution of earning power. The employee, therefore, is deprived of any remedy against his employer for an actionable injury. It cannot be that the reasoning of Mr. Justice Pitney in the White case can be twisted into any such conclusion.

The argument of the appellant that facial disfigurement is wholly unrelated to ability to work will not bear the test of common experience. It is common knowledge and observation that an employer is influenced by a man's personal appearance and that serious damage to the face will continue to be a detriment to a man or woman's ability to earn during his or her entire life. It may be conceded that facial disfigurement is a special and unique form of disability; that it may not disable a man from actual manual labor as is the case with some other accidents. It is on account of this special consideration that the law has taken such cases out of the usual category of disabling accidents where award is made by the week for the disability suffered. Therefore, the general purpose of the law is for a weekly compensation, but the special feature of facial disfigurement is merely an exception as to the manner of payment for disability while the general considerations for the substitution of a theory of compensation for actions for negligence still obtain.

Awards for facial disfigurement, however, are in general accord with other parts of this law. The law provides for a definite amount for permanent partial disability, for the loss of any fingers or of any toes, for the loss of a leg, hand and arm, or an eye. All these are losses of portions of the body and similar to the loss of a nose or an ear. A man may lose one toe or several toes, without impairing his earning capacity. The loss of an eye is a loss of a part of the face. Of course, the loss of an eye is much more apt to interfere with a man's earning power than the loss of an ear or possibly a nose, but it is only a matter of degree.

The argument of plaintiff-in-error proceeds upon the assumption that disfigurement has no relation to earning capacity. He further assumes that:

> "Reparation for diminution or destruction of earning power being, then, the basis of constitutional sanction for compulsory payment of compensation, in the absence of fault on an employer's part, the award for disfigurement, under review herein, cannot stand."

By implication he assumes also, that in this or other cases of facial disfigurement, proof might be made of diminution of earning power on account of facial disfigurement.

It is not for this court to pass upon any such question of fact. The question here is as to the law itself — does it invade the constitutional rights?

Judge Cardozo says in the opinion in the case of the *American Knife Company* v. *Sweeting:*

> "One cannot defeat a statute by a presumption that in its enactment the truths of

> life have been ignored. The presumption is, on the contrary, that they have been perceived and heeded. But one of the truths of life is that serious facial disfigurement has a tendency to impair the earning power of its victims. In some callings it would rule out altogether an applicant for employment. In most it would put him at a disadvantage when placed in competition with others."

In the case of *Ball* v. *William Hunt & Sons, Ltd.*, 5 B. W. C. C. 459, the House of Lords had before it the case of a workman who was blind in one eye, but was to all appearances two-eyed. As the result of a new accident the blind eye had to be removed and he could no longer conceal his infirmity. He was then quite unable to obtain work through either his old employers or from anywhere else. The House of Lords held that incapacity for work includes inability to get work, and that the man was entitled to compensation for the disfigurement.

All the features of the Compensation Law of New York were before this court upon the first argument and upon the reargument. The amendment in question had been adopted and was a part of the law at that time, being an amendment to subdivision 3 of section 15, added by Chapter 22, Laws of 1916, as follows:

> "In case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars."

Counsel for the plaintiff-in-error contends (page 10), that due process of law contemplates

that damages shall be fixed and awarded, if at all, by a jury and not by a court. The amendment to the Constitution of the State of New York, however, provides "for the adjustment, determination and settlement with or without trial by jury of issue which may arise under such legislation."

It is recognized by a long list of decisions that the first ten amendments to the United States Constitution are not operative on the states:

Baron v. *Baltimore*, 7 Pet. 243.
Spies v. *Illinois*, 123 U. S. 131
Barrington v. *Missouri*, 205 U. S. 483.
Twining v. *New Jersey*, 211 U. S. 93.

THE FACE

Counsel for plaintiff-in-error has spoken of the disfigurement provision of the law as the *beauty clause*, as if it were of minor importance — a thing of shreds and patches — implying that it did not much matter if a man should lose his face, provided his earning ability were not diminished. We have only to obtain the Chinese viewpoint to see that to lose one's face is the direst of calamities.

The soldier in the great war was more concerned over injury to the face than any other part of his body.

To woman the face is her dearest possession. Powder and rouge and paste, and divers other artifices are used to preserve it. The beauty of the paintings of the old masters is centered in the face. A half a million dollars would not purchase the Madonna di San Sisto of Raphael or the Mona Lisa of Leonardo da Vinci.

The face stamps the individual so that he may be recognized. As no two faces, so no two souls are absolutely alike. An unnumbered series of individual faces are formed after the same general type, without making any one the exact counterpart of the other.

Helen of Troy formed the motif of Homer's Iliad. As Marlowe says:

"Is this the face that launched a thousand ships
And burned the topless towers of Ilium?"

The face is the expression of the mind. It is that physical portion of us that distinguishes us from the brutes.

"See what a grace was seated on this brow
Hyperion's curls; the front of Jove himself;
An eye like Mars, to threaten and command;
A station like the herald Mercury
New-lighted on a heaven-kissing hill,—
A combination and a form indeed
Where every god did seem to set his seal
To give the world assurance of a man."

In the face are contained four senses which are the sources of pleasurable delight.

"Oh what a noble gift of heaven is the light of the eye," says Schiller.

With the ear we hear oftentimes "the still, sad music of humanity."

With the nose we may inhale all the perfumes of Araby. Properly formed it fits in with the scheme of personal beauty.

Cyrano de Bergerac's nose made it impossible for him to try to win the love of Roxane.

Then to some come the pleasure of taste, the delights of eating and drinking. Even the poet Keats is said to have put pepper on his tongue

that he might enjoy to a more superlative degree the coolness of the claret which he drank.

The sense of touch reaches consummation in the face, whether it be the passionate kiss of love, the chaste kiss of friendship or the Judas kiss of treachery.

The history of the world might be written in faces,— the snub nose of Socrates — the warty face of Cromwell — the majestic head of Washington — the strong, sad features of Lincoln.

Then there are the faces of women who have troubled the peace of the world — Helen of Troy and Cleopatra, Beatrice Cenci and Beatrice d'Este, Lady Hamilton and Aspasia, Queen Elizabeth, the virgin but virile Queen of England, and Joan of Arc, the martyred Maid of France.

We all look forward to see the faces of these men and women of history, as well as those of personal friends, for

"With the morn those angel faces smile
Which I have loved long since and lost awhile."

POINT II

THE ORDER OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, AFFIRMING THE AWARD OF THE WORKMEN'S COMPENSATION COMMISSION SHOULD BE AFFIRMED.

Respectfully submitted,
CHARLES D. NEWTON,
Attorney-General.

E. C. AIKEN,
Deputy Attorney-General.
Of Counsel for the State Industrial Commission.

(27,126)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 375.

AMERICAN KNIFE COMPANY AND ÆTNA LIFE INSURANCE COMPANY, PLAINTIFFS IN ERROR,

vs.

GEORGE SWEETING.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Record on appeal to Court of Appeals	6	1
Statement	1	1
Notice of appeal	2	2
Employer's first report of injury	4	2
Attending physician's report	6	4
Employee's claim for compensation	9	5
Notice of award, February 28, 1918	13	7
Agreement as to wage	15	8
Notice of award, March 11, 1918	16	9
Attending physician's report	18	10
Hearing of March 27, 1918	21	12
Hearing of May 23, 1918	21	12
Testimony of Dr. W. F. Law	22	12
George Sweeting	24	14
Mrs. George Sweeting	31	19

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 4, 1919.

	Original.	Print.
Stipulation as to photographs	34	20
Notice of award, May 27, 1918	35	21
Conclusions of fact, ruling of law, award, and decision	36	21
Affidavit of no opinion	41	23
Certification of record	42	24
Order settling case	43	24
Order of affirmance	44	24
Order of Commission	46	25
Notice of appeal	47	26
Affidavit of no opinion	49	27
Certification of record	50	27
Order settling case	50	27
Remittitur	51	28
Judgment on remittitur	53	29
Opinion, Cardozo, J.	55	30
Præcipe for record	61	34
Clerk's certificate	64	35
Return to writ of error	66	36
Certificate of lodgment	68	37
Bond on writ of error	69	37
Prayer for reversal	75	44
Petition for writ of error	76	45
Assignment of errors	82	48
Writ of error	84	49
Citation and service	86	50

a Court of Appeals, State of New York.

Before State Industrial Commission.

In the Matter of the Claim of GEORGE SWEETING, Claimant-Respondent, for Compensation under the Workmen's Compensation Law.

against

AMERICAN KNIFE CO., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

Record on Appeal.

William H. Foster, Attorney for Appellants, Syracuse, N. Y.
Hon. Merton E. Lewis, Attorney General, Attorney for State Industrial Commission, Respondent, The Capitol, Albany, N. Y.
Hon. Robert W. Bonynge, Counsel for State Industrial Commission, 230 Fifth Ave., New York City.
Olmsted, Van Bergen & Searl, Attorneys for Respondent, Syracuse, N. Y.

1 Court of Appeals, State of New York.

Before State Industrial Commission.

In the Matter of the Claim of GEORGE SWEETING, Claimant-Respondent, for Compensation under the Workmen's Compensation Law.

against

AMERICAN KNIFE CO., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

Statement Under Rule 41.

This is an appeal from an order of the Supreme Court, Appellate Division, Third Department, made and entered in the office of the Clerk of the Appellate Division, Third Department, on November 25, 1918, which affirmed an award of the State Industrial Commission made and entered in the office of the Commission on the 27th day of May, 1918, and also from the order of the Commission
2 making the order of the Appellate Division the order of the Commission dated December 9, 1918. This proceeding was commenced by filing with the State Industrial Commission Employer's First Report of Injury, dated Dec. 21, 1917. There has been no change of parties or attorneys since the commencement of this proceeding.

Notice of Appeal.

Supreme Court, Appellate Division, Third Department.

Before State Industrial Commission.

In the Matter of the Claim of GEORGE SWEETING, Claimant-Respondent, for Compensation under the Workmen's Compensation Law.

VS.

AMERICAN KNIFE Co., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

SIRS: Please take notice that the American Knife Co., Employer, and the Ætna Life Insurance Co., Insurance Carrier, hereby appeal to the Appellate Division of the Supreme Court, Third De-
3 partment, from an award of the State Industrial Commission made and entered in the office of the State Industrial Commission on the 27th day of May, 1918, and from each and every part of said award.

Dated, June 19, 1918.

Yours, etc.,

WILLIAM H. FOSTER,
Attorney for Appellants.

Office & P. O. Address, Union Bldg., Syracuse, N. Y.

To Joseph H. Hollands, Clerk Supreme Court, Appellate Division, Third Department, Albany, N. Y.; Hon. Merton E. Lewis, Attorney General, Attorney for State Industrial Commission, Albany, N. Y.; Robert W. Bonynge, Counsel State Industrial Commission, 230 Fifth Ave., New York City; George Sweeting, Claimant, 14 River St., Baldwinsville, N. Y.; Olmsted, Van Bergen & Searl, Attorneys for Claimant, 474 So. Salina St., Syracuse, N. Y.

4 *Employer's First Report of Injury.*

Ætna Life Insurance Company,

Accident & Liability Department,

Hartford, Connecticut.

New York Office.....100 William Street
Albany Office.....Arkay Building
Syracuse Office.....Union Building
Rochester Office.....Dake Building
Buffalo Office.....White Building

Bureau of Workmen's Compensation.

Claim No. —.

Case of —— ——.

Employer's name. American Knife Co. Office Address. Baldwinsville, N. Y. (Street and number, city or village and county.)
Business (goods produced, work done or kind of trade or transportation). Manufacturing Machine Knives.
Location of plant or place of work where accident occurred (if not at office address). Baldwinsville, N. Y. (Street and number, city or village and county.)
Date of accident. 21 day of December, 1917; hour of day, 2.15 P. M. Hour injured employee began work that day. 7 A. M.
Did accident happen on the premises? Yes. Away from the plant of employer? —. If away from the plant, state where? —.

5 Full name of injured employee. George Sweeting. Address. River St., Baldwinsville, N. Y. (Street and number, city or village and county.)
Sex. Male. Age 34. Single, married widowed or divorced. Married. Speak English? Yes. If not, what language? —.
Occupation when injured? Burring slots on planes knives. In what department of plant or branch of work? Grinding Dept.
Was injured employee doing his regular work? Yes. If not, state regular occupation. —.
How long was injured person in your employment? 7 yrs. Piece or time worker? Both. Wages or average earnings per day? $2.50. Working hours per day. 9.
Name of machine, tool or appliance involved, if any. Emery wheel. By what kind of power driven? Water.
Hand or mechanical feed? Hand. Part on which accident occurred? Emery wheel.
Describe in full how the accident occurred. Employee was burring out slot on planes knife, cramped knife on emery wheel which broke the wheel, broken parts of wheel flew in face, badly lacerating the nose.
State part of person injured and nature of injury. Nose badly lacerated.
Did injury cause loss of any member or part of member? No. If so, describe exactly. —.
Was medical attendance provided by you? Yes. How soon after accident? At once. Name and address of physician. Dr.
6 R. L. Sullivan, Baldwinsville, N. Y. To what hospital was employee sent? St. Josephs.
If not sent to hospital, where is he? —. Are you still providing medical attendance? Yes.
Has employee returned to work? No. Date and hour of return. —. If so, is he fully recovered and earning full wages? —.

If not returned to work, probable length of disability (give your best estimate). —.

In what company is Compensation Insurance carried? (must be answered) Ætna Life Insurance Co.

Signed at Baldwinsville, N. Y. this 21 day of December, 1917.

Firm name American Knife Co. Signed, E. P. Tooley. Official title, Secretary.

Attending Physician's Report.

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 1 Madison Avenue.

Bureau of Workmen's Compensation.

File No. —. Case No. —.

All questions in this blank should be answered, and the report should contain an account of all injuries, no matter how
7 trivial. Fill out blank in ink, using pen or typewriter, and mail promptly to the Commission at its New York City Office.

1. Name of injured person. George Sweeting. Address. Baldwinsville, N. Y.

2. Date of accident. Dec. 21, 1917, at 2:10 P. M. Was first treatment rendered by you? Yes. When? Dec. 21, '17.

3. If not, by whom? —. Address. —.

4. If an assistant, consultant or anæsthetist was necessary give name and address. Sent to Hospital.

5. Who furnished necessary medical supplies? R. L. Sullivan. Was a nurse ordered by you? No.

6. Name of nurse. —. Address. —.

7. Was injured person removed to hospital? Yes. Name of hospital. St. Joseph's. Address. Syracuse, N. Y.

8. Give an accurate description of the nature and extent of the injury. Deep cut on left side of upper lip. Deep cut extending from upper lip through nares to floor of nose. Lettum broken and same cut extending across the bridge of nose to right side of nose.

9. Describe the treatment? Sutures and selie forms in nose. Plastic surgery.

10. Are the symptoms from which he is suffering due entirely to this injury? Yes.

11. Is he able to attend to any part of present or any other occupation? No.

8 12. Has the injury resulted in a permanent disability? Yes. If so, what? Disfigurement of face from cut on lip and injury to nose. (Permanent disability, such as loss of whole or parts of fingers, etc., must be accurately marked on diagram.)

13. Has previous sickness or injury contributed to his disability? No. If so, to what extent? —.

14. Is there evidence of syphilis? no. Tubercular infection? no. Alcoholism? no. Any infectious disease? no. Occupational disease? no. Neurasthenia? no. Hypochondriasis? no. Hysteria? no. Exaggeration? No. Is there evidence of malingering? No.

15. For what period, from the date of accident, is disability likely to exist. 7 weeks. — days.

16. State, in patient's own words, how accident occurred. A revolving emery wheel broke and struck him in the face.

17. Remarks. Very serious injury. Under Dr. F. Flaherty's care.

R. L. SULLIVAN,
Attending Physician, Baldwinsville.
(Address.)

Graduate of Syracuse, Year 1900.
Date, Baldwinsville, N. Y., 1917.

9 *Employee's Claim for Compensation.*

(See Note on Margin Hereof.)

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

Syracuse Office: 428 South Salina Stree

Division of Claims.

Claim No. —. S.

Case of —— ——.

Having first presented a claim to my employer and not having within ten days thereafter reached an agreement with him for payment of compensation, I hereby present my claim to the State Industrial Commission for compensation for disability resulting from an accident arising out of and in the course of my employment and not occasioned by my wilful intention or solely through intoxication, and in support of it I make the following statement of facts:

Name of injured person. George Sweeting, Jr.

Address (Street and number) 14 River St., Baldwinsville, N. Y. (City or village and county) Onondaga Co.

Sex, male. Age 34. Nationality, American. Speak English? Yes. Married? Yes.

Date of accident. December 21st, 1917. Hour of day, 2:10 P. M.

On what date were you compelled to stop work as result of this injury? December 21st, 1917.

Exact location of place where accident happened? American Knife Works, Baldwinsville.

10 Was it at the plant or away from it? At the plant.

State occupation when injured. (Polisher) Burring slots.

How long have you worked at this occupation? Seven months.

How long have you worked for present employer? Eight years.

Were you doing your regular work when injured? Yes.

Piece or time worker? Both. Wages per full day? $2.50 and $3.25.

How did accident happen? I was working on emery wheel burring slots on planing knives at American Knife Works, Emery wheel broke, a piece of the emery wheel struck me in face on nose between eyes.

State fully nature of injury. Split entire length of nose, injured jaw bone, loosened teeth, injured head, smashed nose, disfigured nose and face.

Name of employer. American Knife Company, Inc.

Office address (Street and number) (City or village and county) Baldwinsville, N. Y.

Nature of business. Mfg. knives, cleavers, etc.

Have you returned to work? No.

If so, when? —.

If not, when will you be able to return? About April first estimated.

11 Have you received any wages (this does not mean compensation) since the date of your accident? No.

If you have been paid your wages, to what date? —.

Will you be able to take up regular employment when you return to work? No.

If not, why not? Poor eyesight.

Name of attending physician? Dr. R. L. Sullivan.

Address. Baldwinsville, N. Y.

If taken to hospital, give name and address of hospital and date. St. Joseph's Hospital at Syracuse, N. Y., Dec. 21, 1917.

Did you request your employer to provide medical attendance? No. Has he done so? Yes.

(Printed on margin:)

This form must not be used unless employer and employee fail to reach an agreement for compensation.

I hereby agree to accept the compensation awarded by the State Industrial Commission in lieu of any other right or cause of action which I may have or claim against any person, firm, or corporation, in consequence of such accident; and, in consideration of such compensation, if any, when awarded, I hereby assign and set over unto the State Industrial Commission, for the benefit of the State Insurance

Fund, if compensation be payable therefrom and otherwise to
12 the person or association or corporation liable for the payment of such compensation, all my right, title, and interest, if any, in such cause of action for such injury, loss, or damage against any person, firm, or corporation.

Signed, this 6th day of February, 1918, at Baldwinsville, N. Y.

—— ——,
(Claimant sign full name here.)
14 *River Street, Baldwinsville, N. Y.*
(Address to which mail should be sent.)

STATE OF NEW YORK,
County of Onondaga, ss:

On this 6th day of February, 1918, personally appeared before the undersigned, a Notary Public in and for the said County and State, the above named George Sweeting, Jr., to me well known, and to whom I have read the foregoing questions and answers, and all the matter above stated, and who, after being fully advised in the premises, subscribed his name thereto in my presence, and made oath that the foregoing statements, and each of them, are full and true, and are made without reservation or concealment.

(Signed) GEORGE SWEETING, JR.,
[SEAL.] *Post-office Address, Baldwinsville, N. Y.*

13 *Notice of Award.*

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

Syracuse Office: 428 South Salina Street.

Claim No. 2407-S.

Date, 2/28/18.

To American Knife Works, Employer, Baldwinsvile, N. Y., and Geo. Sweeting, Employee, No. 14 River St., Baldwinsville, N. Y., and Ætna Life Insurance Company, Insurance Carrier, Union Bldg., Syracuse, N. Y.:

You are hereby notified that at a meeting of the State Industrial Commission held February 26, 1918, a decision and award of compensation was made in the above matter, as follows: $1— for — weeks' disability at $— per week (this does — include first two weeks for which compensation is payable only in cases in which disabiilty has lasted more than forty-nine days), and the case was deferred until March 5, 1918, $— per week for a period of — weeks, beginning —— —, 191–.

The employer is hereby directed, in accordance with the provisions

of the Workmens' Compensation Law, to pay the above award to the employee in the following manner:

14 $— at once for a period (from —— —, 191–, to —— —, 191–) and the balance (if any) periodically, in accordance with the method of payment of wages of the employee at the time of injury.

The above copy of the decision and award is sent to you pursuant to sections 20 and 23 of the Compensation Law.

STATE INDUSTRIAL COMMISSION.
JOHN MITCHELL, *Chairman.*

Attest:
WILLIAM S. COFFEY, *Secretary,*
By A. I. SMITH,
Chief of Claims.

L. R.

NOTE.—Correspondence should be addressed to 428 South Salina Salina Street, Syracuse, N. Y.

To the claimant:

Call at the office of the insurance carrier given above, to collect the amount of award.

15 *Agreement of Employer and Employee as to Wage.*

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

Syracuse Office: 230 5th Avenue.

Division of Claims.

Claim No. 2407 N. Y.

Case of Geo. Sweeting, Jr.

State Industrial Commission, 230 5th Ave., New York.

We hereby certify that Geo. Sweeting injured while in our employ, on or about the 21st day of December, 1917, had been engaged in the same or similar employment for a period of six months and that his average daily wages during the year immediately preceding the date of his aforesaid injury was at the rate of $2.75.

Employer, AMERICAN KNIFE CO.,
Address, *Baldwinsville, N. Y.*

Certificate of Injured Employee.

I, George Sweeting, Jr., injured as aforesaid, while in the employ of above-named employer do hereby certify that the foregoing statement as to my average daily wages is correct.

Injured Employee, GEORGE SWEETING, Jr.,
Street and No., 14 *River St.*,
City or Village, *Baldwinsville, N. Y.*

16 *Notice of Award.*

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

Syracuse Office: 428 South Salina Street.

Claim No. 2407-S.

Date, 3/11/18.

Note.—Carrier to determine whether willing to pay for X-ray photograph showing extent of disability. Dentist's bill will be considered later.

To American Knife Works, Employer, Baldwinsville, N. Y., and Mr. Geo. Sweeting, Employee, No. 14 River St., Baldwinsville, N. Y., and Ætna Life Insurance Company, Insurance Carrier, Union Bldg., Syracuse, N. Y.:

You are hereby notified that at a meeting of the State Industrial Commission held 3/5/18 a decision and award of compensation was made in the above matter, as follows: $95.22 for 9 weeks' disability at $10.58 per week (this does not include first two weeks for which compensation is payable only in cases in which disability has lasted more than forty-nine days), and the case was continued, $— per week for a period of — weeks, beginning —— —, 191–.

17 The employer is hereby directed, in accordance with the provisions of the Workmen's Compensation Law, to pay the above award to the employee in the following manner:

$95.22 at once for period (from 12/21/17 to 2/22/18) and the balance (if any) periodically, in accordance with the method of payment of wages of the employee at the time of injury.

The above copy of the decision and award is sent to you pursuant to sections 20 and 23 of the Compensation Law.

STATE INDUSTRIAL COMMISSION.
JOHN MITCHELL, *Chairman.*

Attest:
WILLIAM S. COFFEY, *Secretary,*
By A. I. SMITH,
Chief of Claims.
L. R.

NOTE.—Correspondence should be addressed to 428 South Salina Street, Syracuse, N. Y.

To the claimant:

Call at the office of the insurance carrier given above, to collect the amount of award.

18 *Attending Physician's Report.*

State Workmen's Compensation Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 1 Madison Avenue.

Bureau of Claims.

Claim No. —.

Case of —— ——.

All questions in this blank should be answered, and the report should contain an account of all injuries, no matter how trivial. Fill out blank in ink, using pen or typewriter, and mail promptly to the Commission at its New York Office.

1. Name of injured person, George Sweeting, Jr. Address Baldwinsville, N. Y.

2. Date of accident, Dec. 21, 1917, at 2:10 P. M. Was first treatment rendered by you? Yes, Dec. 21, 1917.

3. If not, by whom? —. Address —.

4. If an assistant, consultant or anæsthetist was necessary, give name and address. Sent to hospital.

5. Who furnished necessary medical supplies? Employer. Was a nurse ordered by you? —.

6. Name of nurse —. Address —.

7. Was injured person removed to hospital? Yes. Name of hospital. St. Joseph's. Address Syracuse, N. Y.

8. Give an accurate description of the nature and extent of
19 the injury. A deep cut on left side of upper lip almost completely severing lip, left side of nose cut through to the floor. Septum cut through and right side of nose cut, an extension of the cut from the left side.

9. Describe the treatment. Treatment: Silver forms put in the nares and tissues replaced and satured.

10. Are the symptoms from which he is suffering due entirely to this injury? Yes.

11. Is he able to attend to any part of present or any other occupation? No.

12. Has the injury resulted in a permanent disability? Yes. If so, what? Bad disfigurement of upper lip and nose. (Permanent

disability, such as loss of whole or parts of fingers, etc., must be accurately marked on diagram.)

13. Has previous sickness or injury contributed to his disability? No. If so, to what extent? —.

14. Is there evidence of syphilis? —. Tubercular infection? —. Alcoholism? —. Any infectious disease? —. Occupational disease? —. Neurasthenia? —. Hypochondriasis? —. Hysteria? —. Exaggeration? —. Is there evidence of maligning? —.

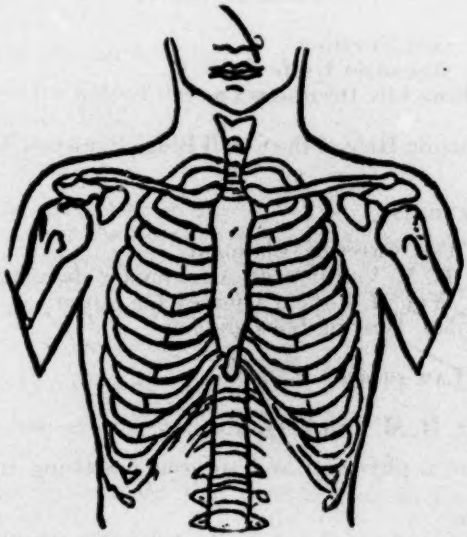
15. For what period, from the date of accident, is disability likely to exist? From surgical viewpoint 6 to 8 weeks, from vocational 6 weeks. — days.

16. State, in patient's own words, how accident occurred. An emery wheel on *wheel* he was working broke and flew and struck him on the face.

17. Remarks. —.

R. L. SULLIVAN,
Attending Physician.

Graduate of Syracuse, Year 1900.
Date Baldwinsville, N. Y., Dec. 27, N. Y., 1917.
Address Baldwinsville, N. Y.
Name of Employer —— ——.



Deep cut on upper left fracture of septum and cut across bridge of nose.

21 *Hearing of March* 27, 1918.

Claim No. 2407—Geo. Sweeting.

Special Hearing Held at the Cahill Bldg., Syracuse, N. Y., March, 27, 1918.

Present:

Commissioner James M. Lynch.
Commissioner Louis Wiard.
Deputy Commissioner W. C. Richards.
Mr. Geo. Sweeting, Claimant.
Mr. H. M. Van Bergen, Attorney for claimant.
Mr. C. H. Goebel, Attorney for carrier.

Adjourned. To be taken up again after decision from Court of Appeals in the case of Erickson vs. Preuss.

Hearing of May 23, 1918.

Before Commissioner James M. Lynch.

Claim No. 2407.

Employee: Geo. Sweeting.
Employer: American Knife Co.
Carrier: Ætna Life Insurance Co.

Special Hearing Held at the Cahill Bldg., Syracuse, N. Y., May 23, 1918.

Appearances:

Mr. Geo. Sweeting, Claimant.
22 Mr. H. M. Van Bergen, Attorney for claimant.
Mr. Wm. H. Foster, Attorney for carrier.
M. F. Quinlan, Hearing Stenographer.

Dr. W. F. Law sworn.

By Mr. H. M. Van Bergen:

Q. You are a physician and surgeon practicing in the City of Syracuse?
A. Yes, sir.
Q. You act as one of the medical advisers for the State Industrial Commission at Syracuse?
A. I do.
Q. You have been called in this morning to see George Sweeting?
A. Yes, sir.

Q. You examined him in regard to his facial disfigurement?
A. Yes, sir.
Q. Will you go ahead and describe his appearance, or the injuries from which he is suffering at the present time and his appearance to you?

A. Mr. Sweeting received a fracture of both nasal bones destroying the bridge of the nose and giving him what is commonly called a flat nose. There is a multiple scar extending longitudinally and transversely over the entire nose. There is a scar extending from the left angle of the nose down to the mouth near the medium line of the mouth. There is another small scar extending from the left angle of the nose obliquely toward the left cheeck.

Q. Describe a little more fully the result of the breaking of the nose. You have described him as having a flat nose. Can
23 you say to what extent the bridge has been broken and flattened down?

A. I think the description I have given of a flat nose describes it fully.
Q. That includes breaking what is commonly known as the bridge—flattened down?
A. The bridge is destroyed. He has what is called flattened nose.
Q. You have never seen this case or had anything to do with it until this morning?
A. No.
Q. These scars are permanent?
A. Yes, sir.

By Commissioner Lynch:

Q. What was the date of the accident?
A. December 21, 1917.

By Mr. Foster:

Q. Will those scars clear up any?
A. The scars over the nose—over the entire length of the nose—will always be permanent. This scar below the nose extending to the lip will be permanent. The little scar extending from the left angle of the nose obliquely to the left cheek may disappear after several years.

By Mr. Van Bergen:

Q. The flat nose effect is permanent?
A. Permanent.

Commissioner Lynch: Mr. Van Bergen, what do you think your client ought to have?

Mr. Van Bergen: I think he ought to have between $2,500 and $3,000. That is, $2,500 is the minimum and $3,000 the maximum.

24 Mr. GEORGE SWEETING, Claimant, sworn.

By Mr. Van Bergen:

Q. You are the claimant in this case?
A. Yes, sir.
Q. You were injured while working on the 21st of December, 1917?
A. I was.
Q. I show you "Exhibit 1" for identification. Is that a picture of yourself?
A. Yes, sir.
Q. When was that taken?
A. Two years before the accident.
Q. Is that a correct likeness of your appearance at that time?
A. Yes, sir.
Q. At one time prior to this accident did you have a fire and burn out?
A. I did.
Q. All pictures of yourself were destroyed at that time?
A. All that I had in my possession.
Q. This you borrowed from somebody else?
A. From my wife's sister.
Q. This is the only picture you have been able to obtain that was taken prior to the accident?
A. Yes.

By Mr. Foster:

Q. I show you "Exhibit 1." Who took that?
A. That was taken in Weedsport.
Q. What was the photographer's name?
A. That I could not tell.
Q. About what year was it taken?
A. Along 1915 or 1916.
Q. How old were you when that photograph was taken?
A. Along about 32.

25 By Mr. Van Bergen:

Q. I show you "Exhibit 2" and "Exhibit 3" for identification. Are these photographs of yourself taken on the same day?
A. They were both taken the same day, yes.
Q. Since the accident?
A. Yes.
Q. Sometime along in February or March of this year?
A. I think it was in February.
Q. Do these pictures accurately represent your appearance at that time?
A. Yes, sir.
Q. Do you recall who took these pictures?

A. A man by the name of Smith in Baldwinsville.
Q. They were taken in Baldwinsville?
A. Yes.
Q. How old are you?
A. 35.
Q. Where were you born and brought up?
A. I was born in Baldwinsville and have lived there most of my entire life.
Q. For about eight or nine years prior to your injury where had you been employed off and on?
A. American Knife Co.
Q. As machine operator?
A. Part of the time—practically most of the time.

By Commissioner Lynch:

Q. What is the business of this company?
A. Making plain knives, machine knives, meat cleavers, paper knives, etc.

By Mr. Van Bergen:

Q. In the manufacturing of their products, they have considerable machinery?
A. Mostly grinders.
26 Q. At the time you were injured, you were operating an emery wheel?
A. I was.
Q. After this injury, were you incapacitated for several weeks?
A. 12 weeks and 4 days.
Q. As soon as you were able, you went back to work?
A. I did.
Q. Your compensation for your disability has ceased and the case has been closed?
A. Yes, sir.
Q. At the present time or when you went back to work, what did you do?
A. I went to Mr. Toohey and he did not want me.
Q. He was the manager of the American Knife Co.?
A. Yes.
Q. Then you went to work for the Government?
A. I did.
Q. In connection with the making of barges at Baldwinsville?
A. Yes, sir.
Q. Since that time, you have worked for the Government?
A. Yes, sir.
Q. In what capacity?
A. Laboring man at first.
Q. What are you doing now?
A. Firing stationary boilers.
Q. You regard this employment as temporary, I assume?
A. It is not my line of business.

Q. This, in a way, is work connected indirectly with the war?
A. Yes.
Q. Are you a married man?
A. Yes.
Q. How many years have you been married?
A. Fourteen years the 17th of last March.
27 Q. How many children have you?
A. Five. Two girls and three boys.
Q. How old is the oldest?
A. 11 the 21st of September.
Q. She is the oldest?
A. Yes.
Q. You and your wife and children attend church at Baldwinsville?
A. Yes, sir.
Q. You and your wife are members of a church up there?
A. Yes, sir.
Q. The children go to Sunday school?
A. Yes, sir.
Q. You and your wife have a circle of friends in Baldwinsville?
A. We have.
Q. You associate with those friends and acquaintances?
A. We do.
Q. It is your custom to mingle with the people of Baldwinsville?
A. Yes, sir.
Q. Attend public functions at various times?
A. Yes, sir.
Q. The usual church gatherings—the usual activities connected with the church?
A. Yes, sir.
Q. Other meetings and gatherings which may be called in Baldwinsville?
A. I do.
Q. I suppose wherever you can go?
A. Yes, sir.
Q. At various times, it has been your custom to visit back and forth with your friends and relatives?
A. Yes, sir.
Q. Prior to this injury, had you ever had any other injury?
A. Only to my finger.
28 Q. Had you ever had any facial or head injury of any kind?
A. No, sir.
Q. This is your wife here in court with you?
A. Yes, sir.
Q. You said Mr. Toohey did not want you to continue working for him?
A. I reported to him for work and he said they did not have any for me to do. I considered myself discharged.
Q. This government job that you are working on has recently been established in Baldwinsville?

A. Yes, sir.
Q. It is solely for the purpose of making barges for the new canal?
A. Lighters for the harbors.

By Mr. Foster:

Q. You and Mr. Toohey had some argument about your carelessness at your work?
A. No, sir.
Q. You had had several other accidents there in the shop?
A. Nothing more than when he first put me polishing I caught my finger.
Q. You had had other accidents?
A. Nothing more than emery flying in my eye.
Q. What did you do before you went there to work?
A. Worked at the Morris Machine Works.
Q. How long did you work there?
A. About a year.
Q. What did you do at the Morris Machine Works?
A. I run a drill, helper and so on.
Q. What were you in the American Knife Co.—helper?
A. I did all lines of the work.
29 Q. What did you do before you worked for the Morris Machine Works?
A. Farmed it.
Q. Whereabouts?
A. Around Baldwinsville.
Q. Do you own a farm?
A. No.
Q. Did you when you were farming?
A. No, sir. I worked a farm on shares one year.
Q. Do you own the house you live in in Baldwinsville?
A. I do.
Q. I understood you to say that you had been working for the cutlery company between eight and nine years?
A. That is off and on.
Q. As a matter of fact, you have not worked there steady during those nine years?
A. Up until I think it was April a year ago, I had been there three years steady—I think it was three or four years.
Q. What were your wages at the time of this accident? What were you getting a day?
A. I was working part of the time on piece work and part of the time on day work.
Q. What were you averaging a week?
A. That was according to the amount of piece work I did.
Q. According to the amount of work you did?
A. According to the piece work that I got. When I was working on piece work, I could average $3.25 a day; when I was working on day work I was getting $2.50 with ten cent bonus.

Q. What were you doing when you had this picture taken, "Exhibit 1"?
A. I was at Toohey's.
Q. You do not know the name of the photographer who
30 took it?
A. I was just up there on a visit and just stopped in. My wife had some taken at the same time.
Q. How large a place is Weedsport?
A. I could not tell you. It is not very large.
Q. Is there more than one photographer there?
A. I do not know.
Q. How far is it from Baldwinsville?
A. I do not know.
Q. Who took this last photograph?
A. Mr. Smith of Baldwinsville.
Q. When did you say they were taken?
A. Along the latter part of February or the fore part of March, I could not tell you just when.

By Mr. Van Bergen:

Q. It was just before we had the hearing here, I think?
A. We were in Weedsport on a visit and we just stopped in and had them taken, that is that "Exhibit 1." My wife was with me.

By Mr. Foster:

Q. Is your mother living?
A. Yes, sir.
Q. Has she no photographs of you?
A. No, sir, she has not.
Q. Didn't you ever have any taken?
A. Only when I was small. They burned out about four years ago.
Q. Have you any brothers or sisters?
A. Yes.
Q. Have they any?
A. I do not know whether they have or not. They all live away from here quite a distance. It is not very often I get in touch with them.

31 By Mr. Van Bergen:

Q. Did you not at my request try to get any pictures you could around Baldwinsville?
A. My mother-in-law had one of the large size.

By Mr. Foster:

Q. Where is your mother-in-law?
A. She burned out since I did and lost everything she had.

By Mr. Van Bergen:

Q. I think you said you own your home there in Baldwinsville?
A. I do.

Mrs. GEORGE SWEETING sworn.

By Mr. Van Bergen:

Q. You live with your husband at Baldwinsville?
A. Yes, sir.
Q. You have a family of five children?
A. Yes.
Q. Were you with your husband when he had this picture, "Exhibit 1," taken?
A. Yes, sir.
Q. Do you recall the date and circumstances connected with it?
A. I do not remember just the day.
Q. I mean about going there?
A. Yes, sir. We were there on a visit to Weedsport. I said "Let's go in and have our pictures taken." He said, "All right." I have a small one of myself just the same.
32 Q. These pictures happened to be given to your sister?
A. Yes.
Q. Does this correctly represent his appearance at that time?
A. Yes.
Q. That was somewhere around two years ago?
A. Yes, it was.

By Mr. Foster:

Q. Do you remember the name of the photographer?
A. I do not. I did not take any notice.

By Mr. Van Bergen:

Q. Were you strangers in Weedsport at the time?
A. I did not know a great many there.
Q. Was the photographer a stranger to you?
A. Yes.
Q. Was there more than one photographer there?
A. That I do not know.

Commissioner Lynch: Mr. Foster, what would you consider?

Mr. Foster: If he is entitled to anything, he is entitled to some fairly substantial award. The disfigurement shows for itself. He does not look very attractive. There is no question about that.

Mr. Van Bergen: He got a very severe injury and it was only after several weeks that he was able to work. He has ulcers and discharge from the nose and all those complications which come from a nose injury but nothing which indisposes him from work but trouble him all the time. They ought to be considered in connection with his facial disfigurement.

Commissioner Lynch: The claimant is awarded $2,500 for
33 facial disfigurement in addition to compensation paid for disability. Carrier directed to pay this amount in one check and close the case.

Attorney Van Bergen's fee approved at $100 with the understanding that he is to take care of Dr. Law's fee.

Mr. Foster: The award of $2,500, in view of the claimant's station in life and the nature of his work, is excessive.

I object to making of any award on the ground that the amendment to subdivision 3 of section 15 by chapter 622 of the Laws of 1916 providing for serious facial disfigurement is unconstitutional in that it assesses damages without the right of a trial by jury in addition to proving compensation for disability.

2nd, it is unconstitutional in that it is contrary to the constitution of the United States and the constitution of the State of New York in that it takes property without due process of law.

3rd. The Compensation Law of New York State being a compulsory act, compensation cannot be awarded for disability and additional compensation for damages for disfigurement in violation of the constitution of the United States and the constitution of the State of New York.

4th. Chapter 622 of the Laws of 1916 added to section 15 of subdivision 3 of the Workmen's Compensation Law of the State of New York is unconstitutional and void.

34 *Stipulation.*

Supreme Court, Appellate Division, Third Department.

Before the State Industrial Commission.

In the Matter of the Claim of GEORGE SWEETING, Claimant-Respondent, for Compensation under the Workmen's Compensation Law,

VS.

AMERICAN KNIFE CO., Employer, and ÆTNA LIFE INSURANCE CO., Insurance Carrier, Defendants-Appellants.

It is hereby stipulated by and between the attorneys for the respective parties hereto that Exhibits 1 and 3 being photographs of the claimant, be omitted from the record herein, and that the originals thereof may be used at the argument of this case before the Appellate Division.

WILLIAM H. FOSTER,
Attorney for Defendant.
MERTON E. LEWIS,
Attorney-General, Attorney for State Industrial Commission.
ROBERT W. BONYNGE,
Counsel State Industrial Commission.

35 *Notice of Award.*

May 27, 1918.

Claim 2407—Geo. Sweeting.

Mr. George Sweeting, 14 River St., Baldwinsville, N. Y.; American Knife Co., Baldwinsville, N. Y., Ætna Life Ins. Co., Union Bldg., Syracuse, N. Y.:

On May 23, 1918, a special hearing of the above case was held at the Cahill Bldg., Syracuse, N. Y., before Commissioner James M. Lynch. There appeared at the hearing

Mr. Geo. Sweeting, Claimant.

Mr. H. M. Van Bergen, Attorney for claimant.

Mr. Wm. H. Foster, Attorney for carrier.

The question of facial disfigurement was taken up and considered. Claimant was awarded $2,500 for facial disfigurement. Carrier was directed to pay this amount in one check and close the case.

Attorney Van Bergen's fee was approved at $100 with the understanding that — is to take care of Dr. Law's bill.

This notice is sent you pursuant to sections 20 and 23 of the Compensation Law.

STATE INDUSTRIAL COMMISSION.
J. M. LYNCH, *Commissioner.*

J. M. L./M. F. Q.

36 *Conclusions of Fact, Ruling of Law, Award, and Decision.*

State Industrial Commission.

Claim No. 2407-S.

In the Matter of the Claim for Compensation, under the Workmen's Compensation Law, Made by GEORGE SWEETING, JR.

against

AMERICAN KNIFE CO., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier.

George Sweeting, Jr., sustained his injuries on December 21, 1917. Thereafter this claim came on for hearing at Syracuse, New York, on February 26, 1918, and March 5, 1918, on which latter date an award of compensation was made for 9 weeks covering period from December 21, 1917, to February 22, 1918. Thereafter, hearing was held on March 27, 1918, April 2, 1918, and May 23, 1918, on which latter date an award of compensation was made for $2,500.00 for serious facial disfigurement, at which time the attorney for the employer and insurance carrier raised the question of the constitutionality of sub-division 3 of section 15 under which said award was made.

37 Appearances:

Robert W. Bonynge, Esq., Counsel of State Industrial Commission.

William H. Foster, Esq., Attorney for Employer and Insurance Carrier.

Olmsted, Van Bergen & Searls, Esq., (H. M. Van Bergen, Esq., of Counsel), Attorneys for Claimant.

All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its Conclusions of Fact, Ruling of Law, Award and Decisions, as follows:

Conclusions of Fact.

1. On December 21, 1917, the day when George Sweeting, Jr., received his injuries, he resided at No. 14 River Street Baldwinsville, New York, and was employed by American Knife Company, engaged in the manufacture of machine knives, with a plant or place of business located at Baldwinsville, New York. George Sweeting, Jr., was employed at said plant in the grinding department operating an emery wheel.

2. On said date, George Sweeting, Jr., was working for his employer at his employer's plant, and while engaged in the regular course of his employment, while operating an emery wheel burring out a slot on a planing knife, the emery wheel exploded
38 and broken parts of said wheel flew into his face, splitting his nose the entire length thereof, injuring his jaw bone and loosening his teeth, which injuries disabled him from the date of said accident and for a period of 12 weeks and 4 days.

The injuries received by George Sweeting, Jr., on said date also resulted in a serious facial disfigurement. The nature of said disfigurement is described as a fracture of both nasal bones destroying the bridge of the nose, and giving him what is commonly called a flat nose; there is a multiple scar extending longitudinally and transversely over the entire nose; there is a scar extending from the left angle of the nose down to the mouth near the *medium* line of the mouth; there is another small scar extending from the left angle of the nose obliquely to the left cheek; the scars over the nose—over the entire length of the nose will be permanent, as well as the scar below the nose extending to the lip, while the little scar extending from the left angle of the nose obliquely to the left cheek may disappear after several years. The flat nose effect is permanent.

3. The injuries sustained by George Sweeting, Jr., were accidental injuries, and arose out of and in the course of his employment.

4. It does not appear whether written notice of injury was
39 given to the employer within ten days after disability, but it has not been established as a fact that such written notice was not given, and it is therefore presumed under section 21 of the Compensation Law that sufficient notice was given.

Ruling of Law.

This claim comes within the provisions of Chapter 67 of the Consolidated Laws, being Chapter 816 of the Laws of 1913, as reenacted and amended by Chapter 41 of the Laws of 1914, and amended by Chapter 316 of the Laws of 1914, and as further amended by the Laws of 1915, 1916 and 1917, known as the Workmen's Compensation Law.

Award.

Award of Compensation is made against the American Knife Co., Employer, and Ætna Life Insurance Company, Insurance Carrier, to George Sweeting, Jr., Injured Employee, in the sum of $2,500.00 on account of and in view of the serious facial disfigurement resulting from the injuries sustained on December 21, 1917; the fee of H. M. Van Bergen, Esq., is approved at the sum of $100.00 with the understanding that he is to pay the bill of Dr. Law, and such sum is made a lien upon this award.

40

Decision.

It is presumed under Section 21 of the Compensation Law, that sufficient notice of injury was given to the employer.

Dated, May 23, 1918.

STATE INDUSTRIAL COMMISSION.
EDW. P. LYON, *Vice-Chairman;*
HENRY D. SAYER,
JAMES M. LYNCH,
Commissioners.

41

Affidavit of No Opinion.

Supreme Court, Appellate Division, Third Department.

Before State Industrial Commission.

In the Matter of the Claim of GEORGE SWEETING, Claimant-Respondent, for Compensation under the Workmen's Compensation Law,

against

AMERICAN KNIFE CO., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

STATE OF NEW YORK,
County of Onondaga, City of Syracuse, ss:

Charles H. Goebel being duly sworn deposes and says that he is a clerk in the law office of William H. Foster attorney for the defendants-appellants herein and is familiar with this file; that no

opinion was rendered by the State Industrial Commission in making the award for compensation herein.

CHARLES H. GOEBEL.

Sworn to before me this 3rd day of Sept., 1918.

F. I. OLMSTED,
Notary Public.

42 *Certification of Record.*

I, William S. Coffey, Secretary of the State Industrial Commission, do hereby certify that I have compared the foregoing papers, except the statement under rule 41, with the respective originals thereof on file in the office of the State Industrial Commission, and that the same are true and correct copies of said originals and of the whole thereof, and that said papers constituted all of the papers and proceedings herein, including the evidence which were before said State Industrial Commission in relation to the foregoing claim.

In witness whereof I have hereunto set my hand and the official seal of the State Industrial Commission on the 3rd day of Sept. 1918.

W. S. COFFEY,
Secretary State Industrial Commission.

43 *Order Settling Case.*

It is hereby ordered that the foregoing case, which contains all the evidence introduced at the hearing of this claim except that stipulated by the parties to be omitted, be and the same hereby is settled as the case herein.

Dated New York, Sept. 3, 1918.

EDWARD P. LYON,
Vice-Chairman State Industrial Commission.

44 *Order of Affirmance.*

At a Term of the Appellate Division of the Suprme Court in and for the Third Department, Held at the Court-house, in the City of Albany, N. Y., Commencing on the 12th Day of November, 1918.

Present: Hon. John M. Kellogg, Presiding Justice;
" George F. Lyon,
" John Woodward,
" A. V. S. Cochrane,
" Henry T. Kellogg,
Associate Justices.

In the Matter of the Claim of GEORGE SWEETING, Claimant-Respondent, for Compensation under the Workmen's Compensation Law,

against

AMERICAN KNIFE CO., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

The above-named American Knife Co. and Ætna Life Insurance Company having appealed from the award of the State Industrial Commission entered in the office of said Commission on the 23rd day of May, 1918, whereby compensation was awarded to the above-named George Sweeting, Jr., injured employee, in the sum
45 of $2,500.00 on account of and in view of the serious facial disfigurement resulting from the injuries sustained on December 21, 1917; the fee of H. M. Van Bergen, Esq., is approved at the sum of $100.00 with the understanding that he is to pay the bill of Dr. Law, and such sum is made a lien upon this award; and said appeal having come on to be heard in this court, and having been argued by William H. Foster, Esq., of counsel for the appellants, and E. C. Aiken, Deputy Attorney General, for the State Industrial Commission, and due deliberation having been had thereon,

Now, on motion of Merton E. Lewis, Attorney General, attorney for the State Industrial Commission, it is

Ordered that said award of the State Industrial Commission appealed from be and the same is hereby unanimously affirmed.

JOSEPH H. HOLLANDS, *Clerk.*

A copy.

[L. S.] JOSEPH H. HOLLANDS, *Clerk.*

46 *Order of Commission.*

Before the State Industrial Commission.

In the Matter of the Claim of GEORGE SWEETING for Compensation under the Workmen's Compensation Law

against

AMERICAN KNIFE CO., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier.

The above named American Knife Co., employer, and Ætna Life Insurance Company, insurance carrier, having appealed to the Appellate Division of the Supreme Court in and for the Third Judicial Department, from the award and decision of the State Industrial Commission, made and entered herein on the 23rd day of May, 1918, whereby compensation was awarded the above named George Sweeting in the sum of $2,500.00 on account of and in view of the serious facial disfigurement resulting from injuries sustained on December

21, 1917; the fee of Mr. Van Bergen is approved in the sum of $100.00, with the understanding he is to pay the bill of Dr. Law, and such sum is made a lien upon this award; and said appeal having been duly heard by said Court, and the Appellate Division of the Supreme Court having at a term thereof commencing on the 12th day of November, 1918, unanimously affirmed the award and de-
47 cision heretofore made by the State Industrial Commission, and the papers on appeal herein together with a certified copy of the said order of the Appellate Division having been duly filed; it is

Ordered, that the order of the Appellate Division be and the same hereby is made the order of the State Industrial Commission, and the award heretofore made herein be and the same hereby is affirmed with interest from May 23, 1918.

Dated: New York, Dec. 9, 1918.

W. S. COFFEY, *Secretary.*

Notice of Appeal.

Court of Appeals, State of New York.

Before State Industrial Commission.

In the Matter of the Claim of GEORGE SWEETING, Claimant-Respondent, for Compensation under the Workmen's Compensation Law

VS.

AMERICAN KNIFE CO., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

SIRS: Please Take Notice that the American Knife Com-
48 pany, Employer, and the Ætna Life Insurance Company, Insurance Carrier, hereby appeal to the Court of Appeals from the judgment and order of affirmance in the Supreme Court, Appellate Division, Third Department, entered in the office of the clerk of the Appellate Division, Third Department, on the 25th day of November, 1918, and also from the order of the State Industrial Commission, making the order of the Appellate Division the order of the State Industrial Commission, dated December 9, 1918, and from each and every part of said orders.

Dated, Syracuse, N. Y., December 16, 1918.

WILLIAM H. FOSTER,
Attorney for Appellants.

Office and Post Office Address, Union Building, Syracuse, N. Y.

To R. M. Barber, Clerk of the Court of Appeals, Albany, N. Y.; Joseph H. Hollands, Clerk Supreme Court, Appellate Division, Third Department, Albany, N. Y.; Hon. Merton E. Lewis, Attorney General, The Capitol, Albany, N. Y.; Robert W. Bonynge, Counsel State Industrial Commission, 230 Fifth Ave., New York City; George Sweeting, Claimant, 14 River Street, Baldwinsville, N. Y.

49 *Affidavit of No Opinion.*

Court of Appeals, State of New York.

Before State Industrial Commission.

In the Matter of the Claim of GEORGE SWEETING, Claimant-Respondent, for Compensation under the Workmen's Compensation Law

against

AMERICAN KNIFE COMPANY, Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

STATE OF NEW YORK,
County of Onondaga, City of Syracuse, ss:

Charles H. Goebel, being duly sworn, deposes and says that he is a clerk in the law office of William H. Foster, attorney for the defendants-appellants herein, and is familiar with this file, that no opinion was rendered by the Appellate Division in affirming the award of compensation herein.

CHARLES H. GOEBEL.

Sworn to before me this — day of December, 1918.

F. I. OLMSTEAD,
Notary Public.

50 *Certificate of Record.*

I, William S. Coffey, Secretary of the State Industrial Commission, do hereby certify that I have compared the foregoing papers, except the statement under Rule 41, with the respective originals thereof *in* file in the office of the State Industrial Commission, and that the same are true and correct copies of said originals and of the whole thereof, and that said papers constituted all of the papers and proceedings herein, including the evidence, which were before said State Industrial Commission in relation to the foregoing claim.

In witness whereof I have hereunto set my hand and the official seal of the State Industrial Commission on the — day of December, 1918.

W. S. COFFEY,
Secretary State Industrial Commission.

Order Settling Case.

It is hereby ordered that the foregoing case which contains all the evidence introduced at the hearing of this claim, except that stipu-

lated by the parties to be omitted, be and the same hereby is settled as the case herein.

Dated, New York, December —, 1918.

EDWARD P. LYON,
Vice Chairman State Industrial Commission.

51 STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the Court of Appeals, Held at Court of Appeals Hall, in the City of Albany, on the 8th Day of April, in the Year of Our Lord One Thousand Nine Hundred and Nineteen, Before the Judges of said Court.

Witness, The Hon. Frank H. Hiscock, Chief Judge, presiding.
R. M. BARBER, *Clerk.*

Remittitur, April 9th, 1919.

In the Matter of the Claim of GEORGE SWEETING for Compensation, &c.

Be it remembered, That on the 28th day of December, in the year of our Lord one thousand nine hundred and eighteen, American Knife Company, Employer, & ano., the appellants in this cause, came here into the Court of Appeals, by William H. Foster, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And State Industrial Commission, the respondent in said cause, afterwards appeared in said Court of Appeals by Merton E. Lewis, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

52 Whereupon, The said Court of Appeals having heard this cause argued by Mr. William H. Foster, of counsel for the appellants, and by Mr. E. C. Aiken, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is affirmed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division, Third Judicial Department, before the Jus-

tices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office.

Albany, April 9, 1919.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER, *Clerk.*

53 At a Term of the Appellate Division of the Supreme Court in and for the Third Judicial Department, Held at the Court-house, in the City of Albany, N. Y., Commencing on the 6th Day of May, 1919.

Present: Hon. John M. Kellogg, Presiding Justice; Hon. George F. Lyon, Hon. John Woodward, Hon. A. V. S. Cochrane, Hon. Henry T. Kellogg, Associate Justices.

In the Matter of the Claim of GEORGE SWEETING for Compensation under the Workmen's Compensation Law

against

AMERICAN KNIFE CO., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.

The above named American Knife Co., and Ætna Life Insurance Company having appealed from the order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department, made at a Term commencing on the 12th day of November, 1918, which affirmed an award of the State Industrial Commission entered in the office of said Commission on the 23rd day of May, 1918, whereby compensation was awarded to the above named George Sweeting, Jr., injured employee, in the sum of $2,500.00 on account of and in view of the serious facial disfigurement resulting from the injuries sustained on December 21, 1917, against which award for facial and head disfigurement appellants, when this cause was before this Court, contended that to make said award would be tantamount to making an award, not for loss of earning power, but for damages, and would, therefore, take the property of appellants without
54 due process of law, in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States; the fee of H. M. Van Bergen, Esq., is approved at the sum of $100.00 with the understanding that he is to pay the bill of Dr. Law, and such sum is made a lien upon this award; and said appeal

having been argued in the Court of Appeals by William H. Foster, Esq., of counsel for the appellants, and E. C. Aiken, Deputy Attorney General, for the State Industrial Commission, and the Court of Appeals after due deliberation had thereon did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from be affirmed with costs; and further ordered that the record and proceedings be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law; and the said remittitur having been filed in this Court.

Now, on motion of Charles D. Newton, Attorney General, Attorney for the State Industrial Commission, it is

Ordered that the order and judgment of the Court of Appeals be and the same is hereby made the order of this Court, and that the award or decision of the State Industrial Commission entered on the 23rd day of May, 1918, be and the same is hereby in all respects affirmed with $90.50 costs to be paid by the appellants.

JOSEPH H. HOLLANDS, *Clerk.*

55 In the Court of Appeals of the State of New York.

In the Matter of the Claim of GEORGE SWEETING, Respondent, for Compensation under the Workmen's Compensation Law

against

AMERICAN KNIFE CO. et al., Appellants; STATE INDUSTRIAL COMMISSION, Respondent.

(Decided April 8, 1919.)

Appeal from an Order of the Appellate Division of the Supreme Court for the Third Department Affirming an Award of the State Industrial Commission.

Wm. H. Foster for appellants.

Charles D. Newton, Attorney-General (E. C. Aiken of counsel), for respondent.

CARDOZO, *J.:*

The claimant was employed in the grinding department of the American Knife Company. The explosion of an emery wheel destroyed the bridge of his nose, giving him what is commonly called a flat nose, with deep scars upon his face. The state industrial commission made an award of $2,500 for serious facial disfigurement. Subdivision 3 of section 15 of the Workmen's Compensation Law (Cons. Laws, chap. 67) (as amended in 1916) provides that "in case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of

the disfigurement, but not to exceed $3,500." The employer and the insurance carrier insist that this provision of the statute is unconstitutional and void.

The argument is that the purpose of the amendment is to compensate the workman for injuries that have no relation to his earning power. If that were in truth the purpose, the statute would still be valid (Matter of Erickson v. Preuss, 223 N. Y. 365). The Constitution (Art 1, section 19) authorizes the adoption of a system of insurance to compensate employees for injuries without regard to
56 fault. Insurance against pain of mind and body is as legitimate, if the amount is kept within the bounds of moderation, as insurance against loss of earnings. It is of no moment that some other measure of compensation may have prevailed in the past. The Constitution does not stereotype the forms of legislation. The common law gave the workman compensation for pain and suffering, as well as for loss of earnings, when the employer was at fault. The statute takes that remedy away, and substitutes insurance within prescribed limits, irrespective of fault. Pain and suffering are part of the risks of the employment. The legislature may make them part of the risks of the insurance. The one restriction on its power is that the burden must be reasonable. (Mountain Timber Co. v. Washington, 243 U. S. 219, 240, 241; N. Y. Central R. R. Co. v. White, 243 U. S. 188, 207.)

The statute would stand, therefore, though facial disfigurement were unrelated to loss of earnings. But in truth it is related, and so the legislature must have found. One cannot defeat a statute by a presumption that in its enactment the truths of life have been ignored. The presumption is, on the contrary, that they have been perceived and heeded. But one of the truths of life is that serious facial disfigurement has a tendency to impair the earning power of its victims. In some callings it would rule out altogether an applicant for employment. In most it would put him at a disadvantage when placed in competition with others. There may, of course, be individual instances of disfigurement without impairment of earning power. That is true also where there has been the loss of a finger or a foot or an eye. Lawmakers framing legislation must deal with general tendencies. The average and not the exceptional case determines the fitness of the remedy.

57 The argument is made, however, that the findings are defective. If the purpose of the statute is to compensate for loss of earnings, there should be a finding, it is said, that the result of the claimant's disfigurement will be diminished earning power. One might as well argue that without a like finding there could be no recovery for the loss of a finger or a foot or an eye. The commission has found that there has been serious facial disfigurement, and that an award of $2,500 is fair and equitable. Those are the ultimate facts to be embodied in the decision. The capacities and opportunities of the individual claimant have at the utmost an evidential value. It is true that the commission has a wide discretion, and in fixing a fair and equitable compensation it may inquire into

all the circumstances that will help to guide its judgment. But those circumstances, however pertinent as evidence, have no place in the findings. The mutilated face, like the mutilated arm or leg, is the capital fact upon which liability depends. The injury alone, without other proof of loss, makes out the claimant's handicap in the struggle of existence. Given the fact of injury, the commission is to assess the damages. The presumption is that all relevant circumstances have been weighed in the assessment. These findings, therefore, would be adequate even if the commission were a court. But in truth it is not a court, and the niceties of code practice have no place in its procedure. Its decision states the facts essential to liability. No more should be exacted.

There is nothing in the point that the extent of compensation must be determined by a jury. The Constitution authorizes "the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation" (Constitu-
58 tion, art. 1, sec. 19). The award is not redress for a tort. It is an allotment to an insured workman of his proportion of a fund maintained for his insurance (Mountain Timber Co. v. Washington, supra, at p. 235). Nor does the statute become invalid because the commission has some discretion in fixing the amount. The legislature may provide for such a method of "adjustment, determination and settlement" as it will. There is reason for the distinction which it has drawn between facial disfigurement and other injuries, though the reason is hardly our concern. Some injuries, as for instance the loss of a limb, may be so defined and classified that the appropriate compensation may with a fair average of justice be estimated in advance. But cases of disfigurement have their special problems. It is difficult, if not impossible, to define and classify the injuries. A flexible compensation makes for justice alike to employer and to workman. It is not important that a lump payment is exacted. That may be done in other cases (Workmen's Compensation Law, sec. 27). The payment is not made by the employer himself, if he insures in the state fund, except to the extent of the premium which he pays for his insurance (Secs. 50, 53). It is a charge upon the fund. He may, of course, be a self-insurer, or pay his premiums to an insurance company (Sec. 50), but that is only at his option.

The statute is constitutional, and the proceedings under it have been regular.

The order should be affirmed with costs.

POUND, *J.* (concurring):

I concur in the result. The compensation awarded to the employee under the Workmen's Compensation Law is based on loss of earning power. An allowance for serious facial or head disfigure-
59 ment so far as such disfigurement has no relation to disability, is an anomaly. (Matter of Marhoffer v. Marhoffer, 220 N. Y. 543.) The language of the opinion in the Erickson Case (223 N. Y. 365-368), "The commission may now make an award

for serious facial or head disfigurement, *even though such disfigurement does not diminish or impair the earning capacity of the claimant,*" is unnecessarily broad and might have been limited to the language of the act itself, which does not include the words italicized.

Doubtless the general language of the New York Constitution (Art. 1, sec. 19) would permit us to uphold a statute which awards compensation to employees for all industrial injuries, without trial by jury, but the theory of the Compensation Acts is that the community rather than the injured workman should carry the burden of impaired earning capacity due to accident. If that theory is extended to cases where the injured man can still work and get work and an administrative board is permitted to assess the damages, a new problem is introduced as to the limits of legislative power (U. S. Const. Amend. 14) and the reasonableness of the burden, the solution of which is not so easy (N. Y. Central R. R. Co. v. White, 243 U. S. 188, 202, 203.)

Serious facial or head disfigurement may leave one able to work and unable to get work. Employers might refuse to employ a disfigured man in his trade either from lack of confidence in his unimpaired ability or because it would be unpleasant for others to work beside him or unprofitable to have him meet the customers. A woman whose hair had been torn off or whose face was badly scarred might be so repulsive to the eye that no one would employ her and yet be as competent as ever to do her work. In a lesser degree, the seriously disfigured face or head of a man might lead to discrimination against him. The House of Lords in Ball v. Hunt & Sons (1912 (A. C.) 496), upholding an award for such injuries, said: "The injury for which the statute gives compensation is not mutilation or disfigurement or loss of physical power, but loss or diminution of the capacity to earn wages." The New York statute, by mentioning facial injuries, merely makes plain what the English act leaves to interpretation. If this award for disfigurement is placed on the broad ground of impaired ability to get work, no violence is done to the purpose of the act. In the absence of a finding of fact negativing such impaired ability on the facts in this case, the award should be sustained. (W. C. L. §21). The order should be affirmed, with costs.

McLaughlin and Andrews, JJ., concur with Cardozo, J.; Hiscock, Ch. J., and Pound, J., concur in result in memorandum by Pound, J.; Chase and Hogan, JJ., vote to remit case to industrial commission for further hearing because of absence of findings showing that disfigurement has resulted in loss of earning power or of ability to obtain employment.

Order affirmed.

61 Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim of GEORGE SWEETING, Claimant-Respondent,

against

AMERICAN KNIFE COMPANY, Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

It is hereby stipulated by and between the attorneys for the respective parties hereto, pursuant to Rule 8 of the Supreme Court of the United States, that the following portions of the record shall constitute the transcript of record on writ of error from the Supreme Court of the United States, and that the Clerk shall transmit to the Clerk of the Supreme Court of the United States only the papers herein designated as follows:

Statement under Rule 41.
Notice of Appeal to Appellate Division.
Employer's First Report of Injury.
Attending Physician's Report.
Employee's Claim for Compensation.
Notice of Award February 28, 1918.
Agreement as to Wage.
Notice of Award March 11, 1918.
Attending Physician's Report.
Hearing of March 27, 1918.
Hearing of May 23, 1918.
Testimony of Dr. W. F. Law.
Testimony of George Sweeting.
Testimony of Mrs. Sweeting.
62 Stipulation as to Photographs.
Notice of Award May 27, 1918.
Conclusions of Fact, Ruling of Law, Award and Decision.
Affidavit of No Opinion by Commission.
Certification of Record to Appellate Division.
Order Settling Case.
Order of Affirmance by Appellate Division.
Order of Commission thereon.
Notice of Appeal to Court of Appeals.
Affidavit of No Opinion in Appellate Division.
Certification of Record to Court of Appeals.
Order Settling Case.
Judgment of the Court of Appeals.
Order of Appellate Division Entered on Judgment of Court of Appeals.
Opinion of Judge Cardozo in the Court of Appeals.

Concurring Opinion of Judge Pound in the Court of Appeals. Dated, May 19th, 1919.

WILLIAM H. FOSTER,
Attorney for Appellants.
CHARLES D. NEWTON,
E. C. A.
Attorney General of the State of New York,
Attorney for Respondent.

63 [Endorsed:] (Original.) Supreme Court, Appellate Division, Third Department. In the Matter of the Claim of George Sweeting, Claimant-Respondent, against American Knife Company, Employer, and Ætna Life Insurance Company, Insurance Carrier, Defendants-Appellants. Stipulation pursuant to Rule 8 of the U. S. Supreme Court. William H. Foster, Attorney for Appellants, Office and Post Office Address, Syracuse, N. Y.

64 Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim of GEORGE SWEETING, Claimant-Respondent,

against

AMERICAN KNIFE COMPANY, Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

STATE OF NEW YORK,
Third Judicial Department, ss:

I, Joseph H. Hollands, Clerk of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of George Sweeting, claimant-respondent, against American Knife Company, employer, and Ætna Life Insurance Company, insurance carrier, defendants-appellants, as set forth in the annexed stipulation bearing date May 19th, 1919, and made pursuant to Rule 8 of the Supreme Court of the United States between the attorneys for the respective parties hereto, and also of the opinions rendered in the Court of Appeals by Judge Cardozo and by Judge Pound herein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Albany, State of New York, this 19th day of May, 1919.

[Seal Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk of the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York.

65 [Endorsed:] (Original.) Supreme Court, Appellate Division, Third Department. In the matter of the Claim of George Sweeting, Claimant-Respondent, against American Knife Company, Employer, and Ætna Life Insurance Company, Insurance Carrier, Defendants-Appellants. Authentication of Record. William H. Foster, Attorney for Appellants, Office and Post Office Address, Syracuse, N. Y.

66 Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim of GEORGE SWEETING, Claimant-Respondent,

against

AMERICAN KNIFE COMPANY, Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

STATE OF NEW YORK,
Third Judicial Department, ss:

In obedience to the commands of the writ of error herein allowed May 14th, 1919, I herewith transmit to the Supreme Court of the United States a duly certified transcript of such portions of the record and proceedings in the above entitled cause as, in pursuance of Rule 8 of the Supreme Court of the United States, the attorneys for the respective parties hereto have by stipulation designated, with all things concerning the same.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Albany, State of New York, this 19th day of May, 1919.

[Seal Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk of the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York.

67 [Endorsed:] (Original.) Supreme Court, Appellate Division, Third Department. In the matter of the Claim of George Sweeting, Claimant-Respondent, against American Knife Company, Employer, and Ætna Life Insurance Company, Insurance Carrier, Defendants-Appellants. Return to Writ of Error. William H. Foster, Attorney for Appellants, Office and Post Office Address, Syracuse, N. Y.

68 Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim of GEORGE SWEETING, Claimant-Respondent,

against

AMERICAN KNIFE COMPANY, Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

STATE OF NEW YORK,
Third Judicial Department, ss:

I, Joseph H. Hollands, Clerk of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, do hereby certify that there have been lodged with me, as such Clerk, this day, in the above entitled cause:

1. The original bond, of which a copy is hereto annexed;
2. Two copies of the writ of error as herein set forth, one for the defendant in error above and one to file in my office;
3. One copy of the prayer for reversal, petition and assignment of errors herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Albany, State of New York, this 19th day of May, 1919.

[Seal Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk of the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York.

69 Supreme Court of the United States.

AMERICAN KNIFE COMPANY and ÆTNA LIFE INSURANCE COMPANY, Plaintiff'-in-error,

against

GEORGE SWEETING, Defendant-in-error.

Know all men by these presents, that the Ætna Casualty and Surety Company of Hartford, Connecticut, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and having its principal business at Hartford, Connecticut, duly authorized to transact business in the State of New York, and having an office for that purpose in the City of Syracuse, N. Y., is held and firmly bound unto George Sweeting in the sum of Four Thousand Dollars ($4000.00) lawful money of the United States, to be paid to said George Sweeting, his executors, administrators and

assigns, for which payment well and truly to be made, the said Ætna Casualty and Surety Company of Hartford, Connecticut, binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with the seal of the Ætna Casualty and Surety Company and dated this 29th day of Apr., 1919.

Now, whereas, the above named the American Knife Company, Employer, and the Ætna Life Insurance Company, Insurance Carrier, are prosecuting a writ of error to the Supreme Court of the United States to reverse the order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York entered on the 29th day of Apr., 1919, whereby a judgment of the Court of Appeals of the State of New York, rendered April 8th, 1919, was made the judgment of said Appellate Division, a reversal of which judgment is likewise sought,

Now, therefore, the condition of this obligation is such that if the above named American Knife Co., Inc., Employer, and Ætna Life Insurance Company, Insurance Carrier, shall prosecute their said writ to effect and, if they fail to make good their plea, shall answer all damages and costs, then this obligation shall be void, otherwise to remain in full force and virtue.

ÆTNA CASUALTY AND SURETY COMPANY OF HARTFORD, CONN.,
By B. E. WATSON,
Resident Vice-President. [L. S.]

Attest:
[L. S.] GEORGE J. KESEL,
Resident Assistant Secretary.

Approved this 14th day of May, 1919, to act as a supersedeas.
LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

70 STATE OF NEW YORK,
County of Onondaga, ss:

On this 29th day of April, 1919, before me personally came B. E. Watson, to me known, who, being by me duly sworn, did depose and say: That he resides in the City of Syracuse, New York; that he is Resident Vice-President of The Ætna Casualty and Surety Company, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Company; that he signed his name thereto by like order; that he is acquainted with George J. Kesel; that he knows him to be the Resident Ass't Secretary of said Company; that the signature of said George J. Kesel, subscribed to said instrument, is in the genuine handwriting of said George J. Kesel, and was thereto subscribed by like order of said

Board of Directors, and in the presence of him, the said B. E. Watson.

FRED I. OLMSTEAD,
Notary Public.

At a regular meeting of the Board of Directors of the Company, duly called and held on the 28th day of December, A. D. 1911, the following By-Law was adopted:

Article 8. Resident Officers, Attorney-in-Fact, and Agents.

Section 1. The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of the Company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any time remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-Fact or Agent, and revoke the power and authority given him.

Section 2. Resident Vice-Presidents may, subject to the provisions and limits named in their certificate of authority, sign and execute on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the President or any other Officer could bind it; Such bonds and undertakings, however, to be attested in every instance by a duly appointed Resident Assistant Secretary.

Section 3. Resident Assistant Secretaries may, subject to the provisions and limits named in their certificate of authority, affix the seal of the Company to and attest on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the Secretary or any other Officer could bind it; such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed Resident Vice-President.

Section 4. Attorneys-in-Fact may, subject to the provisions and limits named in their certificate of authority, execute and deliver and attach the seal of the Company to any and all bonds and undertakings and other writings obligatory in the nature of a bond on behalf of the Company, and any such instrument executed by any such Attorney-in-Fact when attested by any other Attorney-in-Fact shall be as binding upon the Company as if signed, sealed, and attested by any Officer of the Company.

STATE OF CONNECTICUT,
County of Hartford, ss:

I, Norman C. Stevens, — of The Ætna Casualty and Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do hereby

certify that the same is a true and correct transcript therefrom, and of the whole of said original By-Law.

Given under my hand and the seal of the Company, at Hartford, Conn., this 23rd day of September 1918.

[Seal the Ætna Casualty and Surety Company, Hartford, Conn.]

NORMAN C. STEVENS, *Secretary.*

71 The Ætna Casualty and Surety Company, Hartford, Connecticut.

ÆTNA.

Certificate of Authority of Resident Assistant Secretary.

Know all men by these presents that B. E. Watson has been and is hereby appointed Resident Assistant Secretary of The Ætna Casualty and Surety Company, of Hartford, Connecticut, at Syracuse, New York, and as such Resident Assistant Secretary has power and authority to affix the seal of the Company to, and attest on behalf of the Company, any and all bonds and undertakings, and all bonds and undertakings sealed and attested by him, when signed by a duly appointed Resident Vice-President, shall be as valid and binding upon the Company as if said bonds and undertakings had been sealed and attested by the Secretary.

This appointment is made under and by authority of the following By-Law adopted by the Board of Directors of the Company at a meeting duly called and held on the 28th day of December, 1911.

Article 8. Resident Officers, Attorneys-in-fact, and Agents.

Section 1. The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-fact and Agents to represent and act for and on behalf of the company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any time remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-Fact or Agent and revoke the power and authority given him.

Section 3. Resident Assistant Secretaries may, subject to the provisions and limits named in their certificate of authority, affix the seal of the Company to and attest on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the Secretary or any other Officer could bind it; such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed Resident Vice-President.

In witness whereof, the Ætna Casualty and Surety Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, this 26th day of April, A. D. 1919.

THE ÆTNA CASUALTY AND SURETY COMPANY,
By NORMAN C. STEVENS, *Secretary.*

STATE OF CONNECTICUT,
County of Hartford, ss:

On this 26th day of April, A. D. 1919, before me personally came Norman C. Stevens, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Hartford, State of Connecticut; that he is the Secretary of the Ætna Casualty and Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

E. MATHER,
Notary Public.

My Commission Expires Jan. 31, 191–.

72 The Ætna Casualty and Surety Company, Hartford, Connecticut.

ÆTNA.

Certificate of Authority of Resident Assistant Secretary.

Know all men by these presents that George J. Kesel has been and is hereby appointed Resident Assistant Secretary of The Ætna Casualty and Surety Company, of Hartford, Connecticut, at Syracuse, N. Y., and as such Resident Assistant Secretary has power and authority to affix the seal of the Company to, and attest on behalf of the Company, any and all bonds and undertakings, and all bonds and undertakings sealed and attested by him, when signed by a duly appointed Resident Vice-President, shall be as valid and binding upon the Company as if said bonds and undertakings had been sealed and attested by the Secretary.

This appointment is made under and by authority of the following By-Law adopted by the Board of Directors of the Company at a meeting duly called and held on the 28th day of December, 1911.

Article 8. Resident Officers, Attorneys-in-fact, and Agents.

Section 1. The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-fact and Agents to represent and act for and on behalf of the company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any

time remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-Fact or Agent and revoke the power and authority given him.

Section 3. Resident Assistant Secretaries may, subject to the provisions and limits named in their certificate of authority, affix the seal of the Company to and attest on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the Secretary or any other Officer could bind it; such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed Resident Vice-President.

In witness whereof, the Ætna Casualty and Surety Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, this 10th day of March, A. D. 1919.

THE ÆTNA CASUALTY AND SURETY COMPANY,
By NORMAN C. STEVENS, *Secretary.*

STATE OF CONNECTICUT,
County of Hartford, ss:

On this 10th day of March, A. D. 1919, before me personally came Norman C. Stevens, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Hartford, State of Connecticut; that he is the Secretary of the Ætna Casualty and Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

E. MATHER,
Notary Public.

My Commission Expires Jan. 31, 191–.

73 The Ætna Casualty & Surety Company of Hartford, Connecticut.

Financial Statement as of December 31, 1918.

Assets.

Mortgage Loans		$1,442,100.00
Collateral Loans		605,815.05
Stocks & Bonds		6,591,985.15
Unpaid Premiums Subsequent to October 1, 1918		1,498,223.70
Unpaid Premiums prior to October 1, 1918		84,603.31
Cash in Office & Banks		2,094,271.96
Accrued Interest		131,330.82
All other Assets		290,250.84
Total Assets		12,738,580.83
Deduct Assets not Allowed by Insurance Departments viz.:		
Unpaid Premiums prior to October 1, 1918	84,603.31	
Other Assets	171,826.01	
		256,429.32
Admitted Assets on basis allowed by Insurance Departments		12,482,151.51

Liabilities.

Premium Reserve		$3,496,180.54
Claim Reserve		2,997,002.49
Reserve for Accrued Taxes		368,347.62
Reserve for other Liabilities		368,353.84
Reinsurance in other Cos.		11,559.95
Total Liabilities except Capital		7,241,444.44
Surplus	3,497,136.39	
Less Assets not allowed by Insurance Departments	256,429.32	
Surplus on basis allowed by Insurance Departments	3,240,707.07	
Capital Stock	2,000,000.00	
		5,240,707.07
Total		12,482,151.51

STATE OF CONNECTICUT,
County of Hartford, ss:

C. H. Remington, being duly sworn, says: that he is Assistant Treasurer of The Ætna Casualty and Surety Company and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said Company as of December 31, 1918.

C. H. REMINGTON,
Assistant Treasurer.

Subscribed and sworn to before me this 8th day of April, 1919.

[Seal E. A. Giddings, Notary Public, Hartford County.]

E. A. GIDDINGS,
Notary Public.

My Commission expires Feb. 1, 1923.

74 [Endorsed:] (Original.) Supreme Court, Appellate Division, Third Department. In the Matter of the Claim of George Sweeting, Claimant-Respondent, against American Knife Company, Employer, and Ætna Life Insurance Company, Insurance Carrier, Defendants-Appellants. Certificate of Lodgment. William H. Foster, Attorney for Appellants, Office and Post Office Address, Syracuse, N. Y.

75 Supreme Court of the United States.

AMERICAN KNIFE COMPANY and ÆTNA LIFE INSURANCE COMPANY,
Plaintiffs-in-error,

against

GEORGE SWEETING, Defendant-in-error.

Prayer for Reversal.

To the Supreme Court of the United States:

Come now the American Knife Company, Employer, and Ætna Life Insurance Co., Insurance Carrier, plaintiffs-in-error, and pray for a reversal of the order of the Supreme Court of the State of New York herein entered in the office of the Clerk of the Appellate Division thereof, in the Third Judicial Department of said State on the 6th day of May, 1919, affirming a decision and award of the State Industrial Commission of said State, a reversal of which is likewise prayed, entered on the 8th day of April, 1918; and plaintiffs-in-error further pray for a reversal of a judgment of the Court of Appeals

of said State, rendered on the 8th day of April, 1919, upon which said order hereinbefore first mentioned was entered.

And your petitioners will ever pray.

Dated May 9th, 1919.

ROBERT E. WHALEN,
Of Counsel for American Knife Co., Employer, and Ætna Life Insurance Co., Insurance Carrier.

76 Supreme Court of the United States.

AMERICAN KNIFE COMPANY and ÆTNA LIFE INSURANCE COMPANY, Plaintiffs-in-error,

against

GEORGE SWEETING, Defendant-in-error.

Petition for Writ of Error.

To the Supreme Court of the United States and to the Honorable Justices thereof:

The petition of the American Knife Co., Employer, a corporation organized and incorporated under the laws of the State of New York, and the Ætna Life Insurance Company, Insurance Carrier, an insurance corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Connecticut, and having been duly authorized to transact the business of insurance in the State of New York as an insurance corporation respectfully shows:

First. On or about the 21st day of December, 1917, the above named George Sweeting commenced before the State Industrial Commission of the State of New York a special proceeding against your petitioners and therein alleged:

(*a*) That said George Sweeting at about two o'clock in the afternoon of Dec. 21, 1917 while employed as a grinder at the plant of his employer in the Village of Baldwinsville, and while burring out a slot on a planing knife the emery wheel broke, and the broken parts of said wheel flew into his face, splitting his nose the entire length thereof, injuring his jaw bone and loosening his teeth.

(*b*) That aforesaid injuries to said George Sweeting disabled him from the date of said accident and for a period of 12 weeks and 4 days for which loss of earning power he claimed, in accord-
77 ance with the provision of Chapter 41 of the Laws of 1914 of the State of New York, commonly known as the Workmen's Compensation Law, compensation which said State Industrial Commission thereafter awarded to said George Sweeting in the amount of $123.42 which sum your petitioners have paid.

(*c*) That by reason of his said injury as aforesaid, said George Sweeting had also sustained "serious facial and head disfigurement" for which he claimed a further allowance which said State Industrial Commission made to him in the sum of Twenty-five hundred Dollars ($2500.00), by virtue of the amendment, made by Chapter 622 of

the Laws of 1916 of the State of New York, to Subdivision 3 of Sec. 15 of said Workmen's Compensation Law, whereby "in case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award of compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars."

Second. In said proceeding before the State Industrial Commission your petitioners appeared and contended that to make to said George Sweeting any award for facial or head disfigurement under the provisions of said amendment to Subdivision 3 of Section 15 of said Workmen's Compensation Law would be tantamount to making an award not for loss of earning power, but for damages, and would, therefore, deprive your petitioners of their property without due process of law, in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Third. The written decision and award which said State Industrial Commission, after hearing the allegations and proofs of the parties, entered on the 27th day of May, 1918, overruled the contention of your petitioners specified in paragraph Second of this petition, but contained no finding that said facial and head disfigurement had in any wise impaired the earning capacity of said George Sweeting, to whom said decision and award decreed
78 that your petitioners pay for compensation said sum of $123.42, and for said facial and head disfigurement, the said further sum of $2,500.00.

Fourth. From said decision and award of said State Industrial Commission your petitioners duly appealed to the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, where, upon the argument of said appeal which duly came on to be heard, your petitioners, through counsel, duly urged against the validity of said award of $2,500.00 for said facial and head disfigurement the contention hereinbefore specified in paragraph Second of this petition, but said Appellate Division of the Supreme Court overruled said contention and, by an order bearing date November 12th, 1918, and entered in the office of the Clerk of said Appellate Division on the 19th day of November, 1918, said Appellate Division wholly affirmed said decision and award of said commission so entered on the 27th day of May, 1918.

Fifth. From said order of said Appellate Division your petitioners duly appealed to the Court of Appeals of the State of New York, which was and is the highest court of said state in which could be had a decision of the question so raised by said contention of your petitioners hereinbefore specified in paragraph Second of this petition, and which contention your petitioners, through counsel, duly urged upon the argument of said appeal to the Court of Appeals of the State of New York which duly came on to be heard. But said Court of Appeals overruled said contention of your petitioner and, by its judgment rendered April 8th, 1919, said Court of Appeals affirmed said order of said Appellate Division of the Supreme Court, to which said Court of Appeals sent down its remittitur, consisting of a copy of the said judgment of said Court of Appeals and of the papers upon

which said Court of Appeals made its judgment, and said remittitur was filed on the 9th day of April, 1919, in the office of the clerk of said Appellate Division where said remittitur now remains of
79 record. Upon said remittitur a final order, reexamination and reversal of which by this court your petitioners seek, was entered on the 6th day of May, 1919, in the office of the Clerk of said Appellate Division, whereby the said judgment of the Court of Appeals herein became the order of said Appellate Division, and the sum of $99.50 costs of said appeal to said Court of Appeals, was awarded against your petitioners.

Sixth. In said judgment of the Court of Appeals, as well as in said final order thereon so entered on the 6th day of May, 1919, in the office of the Clerk of said Appellate Division, there was drawn in question the validity of a statute of the State of New York, to wit, said amendment made by said Chapter 622 of the laws of 1916 to Subdivision 3 of Section 15 of said Workmen's Compensation Law, upon the ground of the repugnancy of said statute to the due process clause of the Fourteenth Amendment to the Constitution of the United States, but the decision was in favor of the validity of such statute.

Seventh. By virtue of the provisions of said Workmen's Compensation Law said State Industrial Commission, which is now composed of John Mitchell, Edward P. Lyon, James M. Lynch, Henry D. Sayer and Frances E. Perkins, appeared by the Attorney General of the State of New York both in said Appellate Division and in said Court of Appeals, in support of the validity of said statute thus brought up for review by said appeals.

Wherefore, your petitioners pray that a writ of error may be allowed and issued, directed to the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, commanding said Appellate Division to send to the Supreme Court of the United States the record of all and singular the record, and papers in said special proceeding and for citation and supersedeas to stay execution, to the end that the errors to
80 which your petitioners complain herein and in the assignment of errors herein filed may be reviewed and, if errors be found, correctly conformably to the Constitution and Laws of the United States.

And your petitioners will ever pray.

Dated, May 9th, 1919.

AMERICAN KNIFE COMPANY,
Employer, and
ÆTNA LIFE INSURANCE CO.,
Insurance Carrier,
By ROBERT E. WHALEN, *Counsel.*

81 STATE OF NEW YORK,
City and County of Albany, ss:

Robert E. Whalen being duly sworn deposes and says that he is the regularly retained counsel for the petitioners, American Knife

Co., Employer, and Ætna Life Insurance Company, Insurance Carrier, in this proceeding. That he has read the foregoing petition, the contents whereof he knows to be true.

That the reason why this verification is made by deponent is that said petitioners are corporations none of whose officers reside or are within the County of Albany, State of New York, where deponent resides and has his place of business.

ROBERT E. WHALEN.

Subscribed and sworn to before me this 9th day of May, 1919.

[Seal Edith L. Jones, Notary Public, Albany County, N Y.]

EDITH L. JONES,
Notary Public, Albany County, N. Y.

82 Supreme Court of the United States.

AMERICAN KNIFE COMPANY and ÆTNA LIFE INSURANCE COMPANY, Plaintiffs-in-error,

against

GEORGE SWEETING, Defendant-in-error.

Assignment of Errors.

Come now the American Knife Co., Employer and Ætna Life Insurance Company, Insurance Carrier, Plaintiffs-in-error, and make and file this their assignment of errors:

The Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York in its order entered May 6th, 1919, whereby the judgment of the Court of Appeals of the State of New York rendered April 8th, 1919, was made the judgment of said Appellate Division, erred, as did also said Court of Appeals and the State Industrial Commission of the State of New York, in overruling the contention of your petitioners that to make to said George Sweeting an award in this proceeding for facial and head disfigurement, under the amendment made by Chapter 622 of the Laws of 1916 of the State of New York to Subdivision 3 of Section 15 of the Workmen's Compensation Law of said state, would deprive your petitioners of their property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

Dated, May 9th, 1919.

ROBERT E. WHALEN,
Of Counsel for American Knife Co., Employer, and Ætna Life Insurance Co., Insurance Carrier.

83 [Endorsed:] (Original.) Supreme Court of the United States. American Knife Company, Employer, and Ætna Life Ins. Co., Insurance Carrier, Plaintiffs-in-Error, against George Sweet-

ing, Defendant-in-Error. Prayer for Reversal, Petition for Writ of Error, and Assignment of Errors. Robert E. Whalen, of Counsel for Plaintiffs-in-Error, Office and Post Office Address, 126 State Street, Albany, N. Y.

84 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court, Appellate Division, in and for the Third Judicial Department of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, Appellate Division, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between American Knife Company and Ætna Life Insurance Company and George Sweeting, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being
85 repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said American Knife Company and Ætna Life Insurance Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourteenth day of May, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States, October Term, 191–. American Knife Company and Ætna Life Insurance Company, Plffs. in Error, vs. George Sweeting. Writ of Error.

86 UNITED STATES OF AMERICA, *ss:*

To George Sweeting, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court, Appellate Division, in and for the Third Judicial Department of the State of New York, wherein American Knife Company and Ætna Life Insurance Company are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, this Fourteenth day of May, in the year of our Lord one thousand nine hundred and nineteen.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

Due and personal Service of a copy of the within citation is hereby admitted this 16th day of May, 1919.

CHARLES D. NEWTON,
(E. C. A.),
Attorney General of the State of New York.

Endorsed on cover: File No. 27,126. New York Supreme Court Appellate Division, 3d Judicial Department. Term No. 1040. American Knife Company and Ætna Life Insurance Company, plaintiffs in error, vs. George Sweeting. Filed May 21st, 1919. File No. 27,126.

BRIEF OF PLAINTIFFS-IN-ERROR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 375

AMERICAN KNIFE COMPANY AND ÆTNA LIFE INSURANCE COMPANY,
Plaintiffs-in-Error,

vs.

GEORGE SWEETING.

In error to the Supreme Court, Appellate Division Third Judicial Department of the State of New York.

Statement of the Case.

This case involves (transcript page 38) the constitutionality, under the due process clause of the Fourteenth Amendment to the Constitution of the United States, of the "disfigurement clause" which, added by Chapter 622 of the laws of 1916 of the State of New York to subdivision 3 of Section 15 of the New York Workmen's Compensation Law, provides that "In case of an injury resulting in serious facial or head disfigurement, the Commission may in its discretion make such award or compensation as it may deem proper and equitable in view of

the nature of the disfigurement, but not to exceed three thousand five hundred dollars."

So much of the New York Workmen's Compensation Law, thus amended, as is deemed necessary to the decision of this cause, is printed as Appendix "A" on (p. 17 to 32, inclusive) of the brief in the Bianc case, which is No. 374 upon the docket of the present term of court.

Section 19, added to Article 1 of the Constitution of the State of New York in 1913, effective January 1, 1914, is also printed in the brief in the Bianc case, as Appendix "B" thereof (at p. 33) which is No. 374 upon the docket of the present term of this court. It is also printed in full in 243 U. S. at pp. 195-196.

This proceeding was commenced before the State Industrial Commission of the State of New York, a Commission established by the Workmen's Compensation Law, by filing with said Commission a notice of accident by the employer (Transcript pp. 2-3-4) dated December 21, 1919. Thereafter and on February 18, 1918, the claimant, defendant-in-error, filed a claim for compensation (Transcript pp. 5-6-7) stating that on the 21st day of December, 1917, while in the employ of one of the plaintiffs-in-error, he was working on an emery wheel at the plant of his employer; that the wheel broke and a piece of the emery wheel struck him in the face on the nose between the eyes; that as a result thereof, he split the entire length of his nose, injured his jaw bone, loosened his teeth, injured his head, smashed his nose and disfigured his nose and face. He was disabled for a period of 12 weeks and 4 days for

which disability compensation was paid. (Transcript p. 15.)

That thereafter on the 23rd day of May, 1918, the case came on for a hearing before Commissioner Lynch, one of the Commissioners of the State Industrial Commission, and an award for Two Thousand Five Hundred Dollars was made on account of serious facial disfigurement, and also an allowance made to his attorney of One Hundred Dollars with the understanding that out of the One Hundred Dollars the attorney was to take care of the doctor's bill for examination. At that time the following objections to an award for facial disfigurement were made (Transcript p. 20). "The award of $2,500, in view of the claimant's station in life and the nature of his work, is excessive. I object to making of any award on the ground that the amendment to subdivision 3 of section 15 of chapter 622 of the Laws of 1916, providing for serious facial disfigurement is unconstitutional in that it assesses damages without the right of a trial by jury in addition to paying compensation for disability.

2nd. It is unconstitutional in that it is contrary to the constitution of the United States and the constitution of the State of New York in that it takes property without due process of law.

3rd. The Compensation Law of New York State being a compulsory act, compensation cannot be awarded for disability and additional compensation for damages for disfigurement in violation of the constitution of the United States and the constitution of the State of New York.

4th. Chapter 622 of the Laws of 1916 added sec-

tion 15 of subdivision 3 of the Workmen's Compensation Law of the State of New York is unconstitutional and void."

The Commission, however, overruled the objections and on the same day made its decision and award, (Transcript p. 23), as the statute designates the determination of the Commission. In addition to the previous awards for disability, it was also provided (Transcript p. 23). Award of Compensation is made against the American Knife Co., Employer, and Ætna Life Insurance Company, Insurance Carrier, to George Sweeting, Jr., Injured Employee, in the sum of $2,500.00 on account of and in view of the serious facial disfigurement resulting from the injuries sustained on December 21, 1917; the fee of H. M. Van Bergen, Esq., is approved at the sum of $100.00 with the understanding that he is to pay the bill of Dr. Law, and such sum is made a lien upon this award.

The Appellate Division of the Supreme Court in the Third Judicial Department, unanimously and without opinion affirmed the decision and award of the Commission. Transcript pp. 23-24-25.) On further appeal taken to the Court of Appeals, the Appellate Division's order of affirmance was in turn affirmed (226 N. Y. 199). The opinions of the Court of Appeals are printed at pages 30 to 33 of the transcript of the record in this case.

The Court of Appeals sent down its remittitur to the Appellate Division to which the writ of error from this court is directed. (Transcript pp. 29, 49.)

Specification of Errors.

Plaintiffs-in-Error contend that the Court of Appeals as also the Appellate Division and the State Industrial Commission erred in not holding that to make to Defendant-in-Error an award for facial or head disfigurement under the provisions of Section 15 of the Workmen's Compensation Law would deprive Plaintiffs-in-Error of their property without due process of Law in contravention of the provisions of the 14th amendment to the Federal Constitution.

Argument.

Statement of Facts.

On December 21, 1917, at 2:15 P. M. while the claimant, employed by the Knife Company, was burring out slot on planes knife, he cramped the knife on an emery wheel, which broke the wheel and the broken parts of the wheel flew in his face badly lacerating the nose. (Transcript p. 3.) The attending physician in his report gives a description of the nature and extent of injury as "deep cut on left side of upper lip, deep cut extending from upper lip through nares to floor of nose. Lettum broken and same cut, extending across the bridge of nose to right side of nose." For this injury claimant was paid 12 weeks and 4 days, or during the time he was disabled. In addition thereto he suffered a disfigurement of the face from cut on lip and injury to nose. (Transcript p. 4.) For this disfigurement the Commission has awarded him $2500.00. (Transcript pp. 21-23.) The nature of said disfigurement consists of a multiple scar extending longitudinally and transversely over the en-

tire nose. There is a scar extending from the left angle of the nose down to the mouth near the medium line of the mouth. There is another small scar extending from the left angle of the nose obliquely towards the left cheek. (Transcript p. 13.)

There is absolutely no testimony in the record to show show that claimant's earnings have been decreased as a result of his disfigurement or that he has been unable to obtain work as a result thereof beyond the period for which he has already been paid. In fact the method of proving the damages taken by the claimant is that he is a resident of a community, a member of the church, attends various functions of the church and also of the community in which he lives and not in any measure to show that his earnings have been decreased. (Transcript pp. 16-17.)

The accident was caused through no fault of his employer. There is no finding that the claimant's earnings have been decreased or that he has been unable to earn anything as a result of his disfigurement. There has been no finding that the accident was caused through any fault, carelessness or negligence on the part of the employer.

POINT I.

An award for disfigurement under the Workmen's Compensation Law deprives the employer without fault, of its property without due process of law.

1. *Such an award is not compensation but damages.*

This Court in N. Y. C. R. R. Co. vs. White, 243 U. S. 188, Mr. Justice Pitney, writing the opinion, says:

> "Compensation under the Act is not regulated by the measure of damages in negligence suits, but in addition to providing medical, surgical or other like treatment, it is based solely upon loss of earning power being graduated according to the average weekly wage of the employee, and the character or duration of the disability, whether partial or total, temporary or permanent." (Page 93.)

In interpeting this section of the Compensation Law, the New York Court of Appeals in the Matter of Erickson vs. Preuss, 223 N. Y. 365, says at Page 368:

> "The Commission can now make an award for serious facial or head disfigurement even though such disfigurement does not diminish or impair the earning capacity of the claimant; the amount is to be such as the Commission deems proper and equitable in view of the disfigurement not exceeding $3500. Concurrent awards may be made; one for serious facial or head disfigurement, and one for disability or loss of earning power. If so made, then it should clearly appear that the award for facial or head disfigurement does not include anything for diminished earning power."

Erickson vs. Preuss, 223 N. Y. 365-368.

From this it will be plainly seen that an award for disfigurement has been held to be damages. In the case at bar the New York Court of Appeals, Cardozo J., writing the opinion (Transcript p. 31), says:

> "The common law gave the workmen compensation for pain and suffering as well as for loss of earnings *when the employer was at fault.* The Statute takes that remedy away and substitutes insurance within prescribed limits irrespective of fault. Pain and suffering are part of the risks of the employment. The Legislature may make them part of the risks of insurance the one restriction on its power is that the burden must be reasonable.
>
> *Mountain Timber Co. vs. Washington*, 243 U. S. 219, 240 and 241.
> *New York Central Railroad vs. White*, 243 U. S. 188-207.
>
> The statutes would stand, therefore, though facial disfigurement were unrelated to loss of earnings." (Italics ours.)

As I read the White case the New York Compensation law was held constitutional, because under the common law the injured workman was left to bear the greater part of the industrial accident loss, which, because of his limited income he was unable to sustain so that he and those dependent upon him were overcome by poverty, frequently became a burden upon public or private charity, and the Compensation Law substituted therefor a system by which the injured workmen received compensation for his injuries based solely upon loss of earning power according to the average weekly wage at the time of his injury. It relieved the employer from responsibility for damages measured by common law standards, payable in cases

where he, or those for whose conduct he was answerable, were found to be at fault, and required him to pay a reasonable and definite scale by way of compensation for the loss of earning power incurred in a common enterprise irrespective of the question of negligence instead of leaving the entire loss to rest where it may chance to fall—that is upon the injured employe or his dependents.

New York Central Railroad vs. White, 243 N. Y. 188.

When the amendment under scrutiny is interpreted to mean other than loss of earnings, as it has been in the New York courts, it is not a valid exercise of the police power within the rule laid down in the White case. It is not compensation for loss of earnings, but damages.

2. *The award for disfigurement in this case is not based upon impairment of earnings but upon damages.*

There is nothing in the attending physician's report to show that the claimant has lost or will lose his earning capacity as a result of his disfigurement. In answer to the question: "From what period from the date of accident, is disability likely to exist?" the doctor says: "Seven weeks." (Transcript p. 3.)

Again in answer to the question: "From what period from the date of accident, in disability likely ly to exist?" the doctor answers: "From a surgical viewpoint, six to eight weeks, from a vocational, six weeks. (Transcript p. 11.) Claimant was incapacitated from work for a period of twelve weeks and four days. (Transcript p. 15.) The claimant has made no attempt to show that his earning capacity

has been diminished or impaired, but rather takes a different method and shows damages. (Transcript p. 16.)

There is nothing in the record to show that as a result of disfigurement the claimant is liable to become a public charge and as a result thereof that those dependent upon him will become a charge upon public or private charity.

It is probably true that a person who has a disfigurement may have suffered pain and also have a certain feeling of timidness, but this has no relation whatever upon loss of earning power. As was said by this court in the White case: "The physical suffering must be borne by the employe alone, the laws of nature prevent this from being evaded or shifted to another, *and the statute makes no attempt to afford an equivalent in compensation, but besides there is the loss of earning power and the loss of that which stands to the employe as his capital in trade.* This is a loss arising out of the business, and however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the ques-

tion of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents." (pp. 203-204.)

"The subject matter in respect of which freedom of contract is restricted is a matter of compensation which human life or limb, loss or disability incurred in course of hazardous employment, and the public has a direct interest in this as affecting the common welfare." (P. 206.) (Italics ours.)

In Mountain Timber Co. vs. Washington, 243 U. S. 219, this court reiterated its statement that it is a reasonable exercise of the police power to relieve employers from common law liability, and in place thereof to require them to contribute reasonable amounts according to a reasonable and definite scale by way of compensation for loss of earning power to the injured employee or his dependents instead of leaving the entire loss to rest where it may chance to fall—that is upon particular injured employees and their dependents. (Pp. 236-243.)

In Arizona Copper Co. Ltd. vs. Hammer, decided June 9, 1919, and not yet officially reported, at the middle of page 8 of the pamphlet form of the opinion used for certification by the clerk, this Court affirmed by a divided court the power of the people of Arizona through constitutional and legislative provisions, to enact safeguards to keep injured ones and dependents of those whose lives are lost through accident due to the conditions of the occupation from becoming a burden upon the public.

3. *An award for disfigurement is not a reasonable exercise of the Police Power of the State.*

This Court in New York Central Railroad Company vs. White in sustaining the New York Compensation Law, said: "We recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment *and that it cannot be supported except on the ground that it is a reasonable exercise of the Police Power of the State.* In our opinion it is fairly supportable upon that ground."

"The Police Power may be defined in general terms as that power which inheres in the legislature to make, ordain or establish all manner of reasonable regulations and laws whereby to preserve the peace and order of society and the safety of its members and to prescribe the mode and manner in which everyone may so use and enjoy that which is his own as not to preclude a corresponding use and enjoyment of their own by others." (Cooley on Constitutional Law, p. 338.)

The reason given by this court for holding that the Compensation Law can be sustained upon the ground that it is a reasonable exercise of the Police Power is as follows: "The subject matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost, or disability incurred in the cause of hazardous employment and the public has a direct interest in this as affecting the common welfare. * * * This statute does not concern itself with measures of prevention which presumably are impressed in their laws, but the interest of the public is not confined to these. One of the grounds of its concern with the continued life *and earning power* of the individual in its interest in the pre-

vention of pauperism with its concomitants in vice and crime. And in our opinion laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations." (Pp. 206-7.)

The fact that compensation laws are within the scope of the Police Power is again mentioned in the Mountain Timber Company vs. Washington, case 243 U. S. 219-238-243. Also the opinion of Mr. Justice Pitney, Arizona Copper Company, Ltd., vs. Hammer, at pp. 3-4-5 of the clerk's pamphlet copy heretofore referred to.

If, as in the White case, the award under discussion were for loss of earnings and not for damages, as it has been shown, there would be some reason for the exercise of the Police Power, but inasmuch as the Court of Appeals of New York State has held that an amendment allowing disfigurement is not to compensate for loss of earnings, but is damages, it cannot be said that an award for disfigurement is in any way a subject for public concern and, therefore, not a valid exercise of the Police Power.

POINT II.

This court has not held that an award for disfigurement is a proper exercise of the Police Power.

In the White case, 243 U. S. 188, L. R. A. 1917, D. 1, p. 8, Mr. Justice Pitney says: "In viewing

the entire matter it cannot be pronounced arbitrary and unreasonable for the State to impress upon the employer the absolute duty of making a *moderate and definite compensation in money to every disabled employee* or in case of his death to those who were entitled to look to him for support, in lieu of the common law liability confined to cases of negligence.

"This, of course, is not to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable. In this case no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount either in general or in a particular case. Any question of that kind may be met when it arises." (Page 8.) Again on p. 7, he says: "Of course, we cannot ignore the question whether the new arrangement is arbitrary and unreasonable from the standpoint of natural justice. Respecting this it is important to be observed that the act applies *only to disabling or fatal personal injuries* received in the course of a hazardous employment in gainful occupation." (P. 7.) (Italics ours.)

The same is true of the Mountain Timber case.

In the Arizona Copper Company cases the question of disfigurement was not passed upon. Neither was it passed upon in Ball vs. William Hunt & Sons, Ltd. (1912) AC-496. The award was not based upon disfigurement, but upon inability to earn wages.

The case of Erickson vs. Preuss, 223 N. Y. 365, was cited in the concurring opinion of Judge Pound

in the case at bar. (Transcript pp. 32-33.) In that case an award was made for disfigurement to a woman employed in a laundry, and at the hearing before the State Industrial Commission no constitutional objection was raised to the award. Upon appeal to the Appellate Division we asked that court to say that if an award for disfigurement could be made it could be made only when the disfigurement was solely the cause of loss of earning power. No question of whether or not the disfigurement amendment was constitutional was ever raised in that case either before the Commission, Appellate Division or Court of Appeals of the State of New York. When the case came before the Court of Appeals we again asked that court to interpret the statute or amendment as meaning that an award for disfigurement can be made only when the disfigurement is the cause of loss of earnings. We pointed out to them that an award for disfigurement and an award for disability were concurrent awards. We also pointed out to them that this court in the matter of Winfield vs. New York Central Railroad, 216 N. Y. 284, and also their decision in Marhoffer vs. Marhoffer, 220 N. Y. 453, held that the theory of the workmen's Compensation Law was not indemnity to the workman for loss of a member or physical impairment as such, but compensation for disability to work made on the basis of average weekly wages. The court, however, said: "The Commission may now make an award for serious facial or head disfigurement even though such disfigurement does not diminish or impair earning capacity to the claimant; the amount is to be such as the Commission deems proper and equitable in view of the disfigurement not exceeding $3500.

Concurrent awards may be made; one for serious facial or head disfigurement, and one for disability or loss of earning power. If so made, then it should clearly show that the award for facial or head disfigurement does not include anything for diminished earning power.

Matter of Erickson vs. Preuss, 223 N. Y. 365.

It will, therefore, be seen that in the Erickson case no constitutional question was raised; the only question before the Court being the construction of the section. It would seem to follow if the construction of this amendment, placed upon it by the Court of Appeals of the State of New York is correct, that the section must clearly be in violation of the constitutional limitation. It cannot be said that this amendment to the New York act, as construed by the Court of Appeals of the State of New York is a reasonable, proper or valid exercise of the Police Power, and it can with equal force be said this construction takes property of the employer without due process of law.

POINT III.

The award of $2,500 for facial disfigurement in this case should be reversed, and the cause should be remanded for further proceedings not inconsistent with the decision of this court.

All of which is respectfully submitted.

Dated October 13, 1919.

WILLIAM H. FOSTER, of Counsel,
For Plaintiffs-in-Error.

FILED
OCT 10 1919
JAMES D. MAHER,
CLERK.

Brief for the State Industrial Commission of New York

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 375.

AMERICAN KNIFE COMPANY and AETNA LIFE INSURANCE COMPANY,
Plaintiffs in error,

against

GEORGE SWEETING,
Defendant in error

IN ERROR TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD DEPARTMENT.

CHARLES D. NEWTON,
Attorney-General.

E. C. AIKEN,
Deputy Attorney-General.

Of Counsel for the State Industrial Commission.

Brief for the State Industrial Commission

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. 375

AMERICAN KNIFE COMPANY and AETNA LIFE INSURANCE COMPANY,
Plaintiffs-in-Error,

against

GEORGE SWEETING,
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK.

STATEMENT OF CASE

On December 21, 1917, George Sweeting, Jr., was employed at the plant of the American Knife Company in Baldwinsville, N. Y., which is a company engaged in the manufacture of machine knives. He was employed at said plant in the grinding department, operating an emery wheel. (Fols. 37, 4, 5.) While operating said emery

wheel, the emery wheel exploded and broken parts of said wheel struck his face, splitting his nose the entire length thereof, injuring his jawbone and loosening his teeth. This resulted in a serious facial disfigurement. The bridge of the nose was destroyed, giving him what is commonly called a " flat " nose. There were other scars upon the face, making a permanent disfigurement. (Fols. 7, 8, 22, 23, 38.) For this disfigurement the State Industrial Commission of New York awarded him the sum of twenty-five hundred dollars ($2,500). (Fol. 39.) This award was unanimously affirmed by the Appellate Division of the Supreme Court (fol. 45), and by the Court of Appeals (fol. 52). The opinion of that court was written by Judge Cardoza, with a supplementary opinion by Judge Pound. (Fols. 55–60.) The plaintiffs-in-error contend that the amendment to the Workmen's Compensation Law which allowed an award for facial disfigurement is unconstitutional.

ARGUMENT

POINT I

No valid Constitutional objection has been raised and the award for facial disfigurement was properly made.

The Workmen's Compensation Law of New York was thoroughly discussed before this court on argument and reargument, and considered in the case of *New York Central R. R. Company* v. *White*, 243 U. S. 188, and a very exhaustive opinion written by Mr. Justice Pitney and concurred in by the entire court.

The gist of that opinion was that the common law gave the workman compensation for damages when the employer was at fault. That that remedy was taken away and a remedy given for damages received, irrespective of fault; that the Legislature had the right to place such a burden upon the employer, providing the same was reasonable.

Since the decision of that case this court has on two occasions had to deal with Workmen's Compensation Laws of other states. In the case of *Middleton* v. *Texas Power & Light Company*, this court had the question raised by the employe that the Texas Employers Liability Act was in conflict with the due process and equal protection provisions of the Fourteenth Amendment. The court, through Mr. Justice Pitney, stated in reference to the compensation allowed under said statute:

> "Such compensation is the statutory substitute for damages otherwise recoverable because of injuries suffered by an employe, or his death occasioned by such injuries, when due to the negligence of the employer or his servants; it being declared that the employe of a subscribing employer, or his representatives or beneficiaries in case of his death, shall have no cause of action against the employer for damages except where a death is caused by the wilful act or omission or gross negligence of the employer."

Again in the case of *Arizona Copper Company* v. *Hammer,* this court had under consideration the Employers Liability Law and the Workmen's Compulsory Compensation Law of Arizona. The Employers' Liability Law of Arizona designated certain employments as inherently hazardous and dangerous to workmen, and imposed upon the employer, without regard to the question of fault, liability and compensatory damages for accidental personal injuries or death of an employee arising out of and in the course of the employment and due to the condition or conditions of the occupation, in cases where such injury of the employe shall not have been caused by his own negligence.

Regarding this law, the court, through Mr. Justice Pitney says:

> "We are unable to say that the Employers' Liability Law of Arizona, in requiring the employer in hazardous industries to assume — so far as pecuniary consequences go — the entire risk of injury to the employee attributable to accidents arising in the course of the employment, and due to its inherent

conditions, exceeds the bounds of permissible legislation, or interferes with the constitutional rights of the employer."

It is further stated:

"It is objected that the responsibility of the employer under this statute is unlimited; but this is not true except as it is true of every action for compensatory damages where the amount awarded varies in accordance with the nature and extent of the damages for which compensation is made. It is said that in actions by employees against employers juries are prone to render extravagant verdicts. The same thing has been said, and with equal reason, concerning actions brought by individuals against railroad companies, traction companies, and other corporations."

And further:

"The statute says to the employer, in effect: 'You shall not employ your fellowmen in a hazardous occupation for gain, you being in a position to reap a reward in money through selling the produce of their toil, unless you come under an obligation to make appropriate compensation in money in case of their death or injury due to the conditions of the occupation.' The rule being based upon reasonable grounds affecting the public interest, being established in advance, and applicable to all alike under similar circumstances, there is, in our opinion, no infringement of the fundamental rights protected by the 14th Amendment.

"Some expressions contained in our opinion in the *White Case* (243 U. S. 203–205) are treated in argument as if they were equivalent to saying that if a state, making a legis-

lative adjustment of employers' liability, departs from the common-law system of basing responsibility upon fault, it must confine itself to a limited compensation, measured and ascertained according to the methods adopted in the compensation acts of the present day. Of course nothing of the kind was intended. In a previous part of the opinion (pp. 196–200) it had been shown that the employer had no constitutional right to continued immuity from liability in the absence of negligence, nor to have the fellow-servant rule and the rules respecting contributory negligence and assumption of risk remain unchanged. The statutory plan of compensation for injured workmen and the dependents of those fatally injured — an additional feature at variance with the common law — was then upheld; but, of course, without saying that no other would be constitutional. For if, as we held in that case, the novel statutory scheme of awarding compensation according to a prearranged scale is sustainable, it follows, perhaps *a fortiori* that the Arizona method of ascertaining the compensation according to the facts of each particular case — substantially the common-law method — is free from objection on constitutional grounds. Indeed, if a state recognizes or establishes a right of action for compensation to injured workmen upon grounds not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law, or according to some prescribed scale reasonably adapted to produce a fair result, is for the state itself to determine. Where the compensation should be paid in a single sum after judgment recovered, as is required by the Arizona Employers' Liability Law just as under the common-law system in the case of a judgment

> based upon negligence, or whether it would be more prudent to distribute the award by instalment payments covering the period of disability or of need, likewise is for the state to determine, and upon this the plaintiffs in error can raise no constitutional question."

And Mr. Justice Holmes, in his concurring opinion also says:

> "But if it is thought to be public policy to put certain voluntary conduct at the peril of those pursuing it, whether in the interest of safety or upon economic or other grounds, I know of nothing to hinder. A man employs a servant at the peril of what that servant may do in the course of his employment, and there is nothing in the Constitution to limit the principle to that instance."

The argument of the plaintiff-in-error to the effect that an award for disfigurement deprives the employer of his property without due process of law should be turned about. If the employer's argument is sound, the employee is the one that is deprived of property without due process of law and not the employer. The employer contends, of course, that the Workmen's Compensation Law is constitutional and that it is intended to and does take the place exclusively of the remedy for negligence formerly existing against the railroad company for injuries received by its employees. (See *Shanahan* v. *Monarch Engineering Co.*, 219 N. Y. 469). Supposing, however, an employee receives an injury which does not disable him from working but removes say all the hair from his head or smashes his nose or cuts off his ears. If the employee sues the employer for this and it is a case where there is

negligence, the employer will reply that there is no remedy against the employee for the reason that the Workmen's Compensation Law is exclusive. The employee then petitions for compensation under the Workmen's Compensation Law and is met by the argument that the employer's property is taken without due process of law as there is no diminution of earning power. The employee, therefore, is deprived of any remedy against his employer for an actionable injury. It cannot be that the reasoning of Mr. Justice Pitney in the White case can be twisted into any such conclusion.

The argument of the appellant that facial disfigurement is wholly unrelated to ability to work will not bear the test of common experience. It is common knowledge and observation that an employer is influenced by a man's personal appearance and that serious damage to the face will continue to be a detriment to a man or woman's ability to earn during his or her entire life. It may be conceded that facial disfigurement is a special and unique form of disability; that it may not disable a man from actual manual labor as is the case with some other accidents. It is on account of this special consideration that the law has taken such cases out of the usual category of disabling accidents where award is made by the week for the disability suffered. Therefore, the general purpose of the law is for a weekly compensation, but the special feature of facial disfigurement is merely an exception as to the manner of payment for disability while the general considerations for the substitution of a theory of compensation for actions for negligence still obtain.

Awards for facial disfigurement, however, are in general accord with other parts of this law. The law provides for a definite amount for permanent partial disability, for the loss of any fingers or of any toes, for the loss of a leg, hand and arm, or an eye. All these are losses of portions of the body and similar to the loss of a nose or an ear. A man may lose one toe or several toes, without impairing his earning capacity. The loss of an eye is a loss of a part of the face. Of course, the loss of an eye is much more apt to interfere with a man's earning power than the loss of an ear or possibly a nose, but it is only a matter of degree.

The argument of plaintiff-in-error proceeds upon the assumption that disfigurement has no relation to earning capacity. He further assumes that:

> "Reparation for diminution or destruction of earning power being, then, the basis of constitutional sanction for compulsory payment of compensation, in the absence of fault on an employer's part, the award for disfigurement, under review herein, cannot stand."

By implication he assumes also, that in this or other cases of facial disfigurement, proof might be made of diminution of earning power on account of facial disfigurement.

It is not for this court to pass upon any such question of fact. The question here is as to the law itself — does it invade the constitutional rights?

Judge Cardozo says in the opinion in this case:

> "One cannot defeat a statute by a presumption that in its enactment the truths of

> life have been ignored. The presumption is, on the contrary, that they have been perceived and heeded. But one of the truths of life is that serious facial disfigurement has a tendency to impair the earning power of its victims. In some callings it would rule out altogether an applicant for employment. In most it would put him at a disadvantage when placed in competition with others."

In the case of *Ball v. William Hunt & Sons, Ltd.*, 5 B. W. C. C. 459, the House of Lords had before it the case of a workman who was blind in one eye, but was to all appearances two-eyed. As the result of a new accident the blind eye had to be removed and he could no longer conceal his infirmity. He was then quite unable to obtain work through either his old employers or from anywhere else. The House of Lords held that incapacity for work includes inability to get work, and that the man was entitled to compensation for the disfigurement.

All the features of the Compensation Law of New York were before this court upon the first argument and upon the reargument of the White case. The amendment in question had been adopted and was a part of the law at that time, being an amendment to subdivision 3 of section 15, added by Chapter 22, Laws of 1916, as follows:

> "In case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars."

Counsel for the plaintiff-in-error contends (page 10), that due process of law contemplates

that damages shall be fixed and awarded, if at all, by a jury and not by a court. The amendment to the Constitution of the State of New York, however, provides " for the adjustment, determination and settlement with or without trial by jury of issue which may arise under such legislation."

It is recognized by a long list of decisions that the first ten amendments to the United States Constitution are not operative on the states:

Baron v. *Baltimore,* 7 Pet. 243.
Spies v. *Illinois,* 123 U. S. 131.
Barrington v. *Missouri,* 205 U. S. 483.
Twining v. *New Jersey,* 211 U. S. 93.

THE FACE

Counsel for plaintiff-in-error has spoken of the disfigurement provision of the law as the *beauty clause,* as if it were of minor importance — a thing of shreds and patches — implying that it did not much matter if a man should lose his face, provided his earning ability were not diminished. We have only to obtain the Chinese viewpoint to see that to lose one's face is the direst of calamities.

The soldier in the great war was more concerned over injury to the face than any other part of his body.

To woman the face is her dearest possession. Powder and rouge and paste, and divers other artifices are used to preserve it. The beauty of the paintings of the old masters is centered in the face. A half a million dollars would not purchase the Madonna di San Sisto of Raphael or the Mona Lisa of Leonardo da Vinci.

The face stamps the individual so that he may be recognized. As no two faces, so no two souls are absolutely alike. An unnumbered series of individual faces are formed after the same general type, without making any one the exact counterpart of the other.

Helen of Troy formed the motif of Homer's Iliad. As Marlowe says:

" Is this the face that launched a thousand ships
And burned the topless towers of Ilium?"

The face is the expression of the mind. It is that physical portion of us that distinguishes us from the brutes.

" See what a grace was seated on this brow
Hyperion's curls; the front of Jove himself;
An eye like Mars, to threaten and command;
A station like the herald Mercury
New-lighted on a heaven-kissing hill,—
A combination and a form indeed
Where every god did seem to set his seal
To give the world assurance of a man."

In the face are contained four senses which are the sources of pleasurable delight.

" Oh what a noble gift of heaven is the light of the eye," says Schiller.

With the ear we hear oftentimes " the still, sad music of humanity."

With the nose we may inhale all the perfumes of Araby. Properly formed it fits in with the scheme of personal beauty.

Cyrano de Bergerac's nose made it impossible for him to try to win the love of Roxane.

Then to some come the pleasure of taste, the delights of eating and drinking. Even the poet Keats is said to have put pepper on his tongue

that he might enjoy to a more superlative degree the coolness of the claret which he drank.

The sense of touch reaches consummation in the face, whether it be the passionate kiss of love, the chaste kiss of friendship or the Judas kiss of treachery.

The history of the world might be written in faces,— the snub nose of Socrates — the warty face of Cromwell — the majestic head of Washington — the strong, sad features of Lincoln.

Then there are the faces of women who have troubled the peace of the world — Helen of Troy and Cleopatra, Beatrice Cenci and Beatrice d'Este, Lady Hamilton and Aspasia, Queen Elizabeth, the virgin but virile Queen of England, and Joan of Arc, the martyred Maid of France.

We all look forward to see the faces of these men and women of history, as well as those of personal friends, for

"With the morn those angel faces smile
Which I have loved long since and lost awhile."

POINT II

THE ORDER OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, AFFIRMING THE AWARD OF THE WORKMEN'S COMPENSATION COMMISSION SHOULD BE AFFIRMED.

Respectfully submitted,
CHARLES D. NEWTON,
Attorney-General.
E. C. AIKEN,
Deputy Attorney-General.
Of Counsel for the State Industrial Commission.

(27,127)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 376.

CLARK KNITTING COMPANY, INC., AND ÆTNA LIFE INSURANCE COMPANY, PLAINTIFFS IN ERROR,

vs.

ELIZABETH VAUGHN.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Record on appeal to Court of Appeals	*a*	1
Statement under rule 41	1	1
Notice of appeal	2	2
Employer's first report of injury	3	2
Attending physician's report	6	4
Employee's claim for compensation	8	5
Notice of award	12	8
Minutes of hearing at Utica, November 14, 1917	14	9
Notice of award	25	16
Minutes of hearing at Syracuse, January 31, 1918	26	16
Notice of award	34	21
Minutes of hearing, Syracuse, May 23, 1918	35	21

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 4, 1919.

	Original.	Print.
Notice of award	39	23
Conclusions of fact, ruling of law, award, and decision	40	24
Affidavit of no opinion	44	26
Certification of record	45	26
Order settling case	46	27
Order of affirmance	47	27
Order of the Commission	49	28
Notice of appeal	50	29
Affidavit of no opinion	52	30
Certification of record	53	30
Order settling case	53	30
Remittitur	54	31
Judgment on remittitur	55	31
Stipulation as to record	58	33
Clerk's certificate	61	34
Return to writ of error	63	35
Certificate of lodgment	65	36
Bond on writ of error	66	36
Prayer for reversal	72	43
Petition for writ of error	73	43
Assignment of errors	79	47
Writ of error	81	47
Citation and service	83	49

a Court of Appeals, State of New York.

Before State Industrial Commission.

In the Matter of the Claim of ELIZABETH VAUGHN, Claimant-Respondent, for Compensation under the Workmen's Compensation Law

against

CLARK KNITTING CO., INC., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

Record on Appeal.

William H. Foster, Attorney for Appellants, Union Bldg., Syracuse, N. Y.

Hon. Merton E. Lewis, Attorney General, Attorney for State Industrial Commission, The Capitol, Albany, N. Y.

Robert W. Bonynge, Esq., Counsel for State Industrial Commission, 230 Fifth Ave., New York City.

Lee & Dowling, Attorneys for Claimant, Arcade Bldg., Utica, N. Y.

1 Court of Appeals, State of New York.

Before State Industrial Commission.

In the Matter of the Claim of ELIZABETH VAUGHN, Claimant-Respondent, for Compensation under the Workmen's Compensation Law

against

CLARK KNITTING CO., INC., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

Statement under Rule 41.

This is an appeal from an order of the Appellate Division, Third Department, made and entered in the office of the clerk of the Appellate Division, Third Department, on the 19th day of November, 1918, which affirmed an award of the State Industrial Commission made and entered in the office of the Commission on the 12th day of June, 1918, and also from an order of the Commission dated November 25, 1918. This proceeding was commenced by filing with the State Industrial Commission Employer's First Report of Injury, dated April 10, 1917. There has been no change of parties or attorneys since the commencement of this proceeding.

2 *Notice of Appeal.*

Supreme Court, Appellate Division, Third Department.

Before State Industrial Commission.

In the Matter of the Claim of ELIZABETH VAUGHN, Claimant-Respondent, for Compensation under the Workmen's Compensation Law

vs.

CLARK KNITTING CO., INC., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

SIRS: Please Take Notice that the Clark Knitting Co., Inc., employer, and the Ætna Life Insurance Company, Insurance Carrier, hereby appeal to the Appellate Division of the Supreme Court, Third Department, from an award of the State Industrial Commission made and entered in the office of the State Industrial Commission on the 12th day of June, 1918, and from each and every part of said award.

Dated June 19, 1918.

Yours, etc.,

WILLIAM H. FOSTER,
Attorney for Appellants.

3 Office & P. O. Address, Union Building, Syracuse, N. Y.

To Joseph H. Hollands, Clerk Supreme Court, Appellate Division, Third Department, Albany, N. Y.; Hon. Merton E. Lewis, Attorney General, Attorney for the State Industrial Commission, Albany, N. Y.; Robert W. Bonynge, Counsel State Industrial Commission, 230 Fifth Ave., New York City; Elizabeth Vaughn, Claimant, 716 Noyes St., Utica, N. Y.; Lee & Dowling, Attorneys for Claimant, 320-326 Arcade Bldg., Utica, N. Y.

Employer's First Report of Injury.

Ætna Life Insurance Co.,

Accident and Liability Dept.,

Hartford, Conn.

New York Office	100 William St.
Albany Office	Arkay Building.
Syracuse Office	Union Building.
Rochester Office	Dake Building.
Buffalo Office	White Building.

Bureau of Workmen's Compensation.

Claim No. —.

Case of Mrs. Elizabeth Vaughn.

Employer's name, Clark Knitting Co., Inc.
Office address (Street and number, city or village and county), 405 Washington Street.
Business (goods produced, work done or kind of trade or transportation), manufacturing knit underwear.
Location of plant or place of work where accident occurred
4 (if not at office address), (Street and number, city or village and county), 405 Washington St.
Date of accident, 9th day of April, 1917; hour of day, 7:10 A. M. Hour injured employee began work that day, 7 A. M.
Did accident happen on the premises? Yes.
Away from the plant of employer? —.
If away from the plant, state where. —.
Full name of injured employee, Mrs. Elizabeth Vaughn.
Address (Street and number, city or village and county), 716 Noyes St., Utica, N. Y.
Sex. Female.
Age. About 45.
Single, married, widowed or divorced. Married.
Speak English? Yes.
If not, what language? —.
Occupation when injured? Neck cutter.
In what department of plan- or branch of work? Finishing Dept.
Was injured employee doing *his* regular work? No.
If not, state regular occupation. Machine operator.
How long was injured person in your employment? Two months.
Piece or time worker? Time.
Wages or average earnings per day? $2.00.
Working hours per day. 10.
Name of machine, tool or appliance involved, if any. Shafting.
Power driven? Electric.
5 Hand or mechanical feed? —.
Part on which accident occurred? —.
Describe in full how the accident occurred. The operator of a tacking machine lost the screw out of the needle bar and Mrs. Vaughn came along and asked her what she was looking for and volunteered to help find it. Mrs. Vaughn discovered it on the floor on the opposite side of the sewing machine table and she got down on the floor and reached under the shaft and her hair caught in the revolving shaft and removed the scalp from forehead to the base of the skull.
State part of person injured and nature of injury. Scalp and hair removed from the forehead to the base of the skull.

Did injury cause loss of any member or part of member? —.
If so, describe exactly. —.
Was medical attendance provided by you? Yes.
How soon after accident? At once.
Name and address of physician. Dr. A. R. Grant, 321 Genesee St.
To what hospital was employee sent? Homeopathic Hospital.
If not sent to hospital, where is -he? —.
Are you still providing medical attendance? Yes.
Has employee returned to work? No.
Date and hour of return —— —, 191—, — A. M., P. M.
If so, is -he fully recovered and earning full wages? —.
6 If not returned to work, probable length of disability (give your best estimate). Impossible to estimate the length of disability.
In what company is compensation insurance carried? (must be answered). Ætna Ins. Co.
Signed at Utica, N. Y., this 10th day of April, 191—.
Firm name. Clark Knitting Co., Inc.
Signed, Thos. A. Clark. Official title, President.

Attending Physician's Report.

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 1 Madison Avenue.

Bureau of Workmen's Compensation.

File No. —. Case No. —.

All questions in this blank should be answered, and the report should contain an account of all injuries, no matter how trivial. Fill out blank in ink, using pen or typewriter, and mail promptly to the Commission at its New York City Office.

1. Name of injured person. Elizabeth Vaughn. Address. Utica, N. Y.
2. Date of accident. April 9, 1917, at 7:20 A. M. Was first treatment rendered by you? Yes.
3. If not, by whom? —. Address —.
4. If an assistant, consultant or anæsthetist was necessary, give name and address. Asst., Dr. H. L. Pender, Anæsthetist.
7 5. Who furnished necessary medical supplies? Homeopathic Hospital, Dr. C. L. Haines. Was a nurse ordered by you? Two nurses.
6. Name of nurses. Miss Frankhause, Miss Green. Address. Utica, N. Y.
7. Was injured person removed to hospital? Yes. Name of hospital. Hom. Hosp. Address. Utica, N. Y.

8. Give an accurate description of the nature and extent of the injury. Complete *ovulsion* of scalp from hair line over frontal area to the seventh vertebra behind. Ears were torn down and cartilages severed.

9. Describe the treatment. Control of hemorrhage and attempt to unite ears and flaps of complete and partial *avalsed* scalp. The whole calvarium and neck will have to be skin-grafted.

10. Are the symptoms from which she is suffering due entirely to this injury? Yes.

11. Is she able to attend to any part of present or any other occupation? No.

12. Has the injury resulted in a permanent disability? Yes. If so, what? (Permanent disability, such as loss of whole or parts of fingers, etc., must be accurately marked on diagram). Whole scalp lost.

13. Has previous sickness or injury contributed to her disability? No. If so, to what extent? —.

14. Is there any evidence of syphilis? No. Tubercular infection? No. Alcoholism? No. Any infectious disease? No. Occupational disease? Machine caught hair. No. Neurasthenia? No. Hypochondriasis? No. Hysteria? No. Exaggeration? No. Is there evidence of malingering? No.

8

15. From what period, from the date of accident, is disability likely to exist? Many weeks — days.

16. State, in patient's own words, how accident occurred. I was crawling under a machine to get a button dropped by one of the girls.

17. Remarks. Her life is now (April 24) assured, but the whole head and neck will require grafting, followed by a suitable wig.

A. R. GRANT,
Attending Physician.

(Address:) 321 Genesee St., Utica, N. Y.
Graduate of N. Y. Univ. Med. Coll., year '97.
Date, Utica, N. Y., April 24, 1917.

Employee's Claim for Compensation.

State Workmen's Compensation Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 1 Madison Avenue.

Bureau of Claims.

Claim No. 35470.

Case of —— ——.

Instructions.—To facilitate prompt payment of compensation the injured employee, or someone for him, should write carefully (using

ink or indelible pencil) answers to the following questions, and mail the same directly to the Commission within four weeks after date of injury.

9 I hereby make claim for compensation for an injury resulting in my disability, due to an accident upon the 9th day of April, 1917, arising out of and in the course of my employment by Clark Knitting Co. (Name of employer), of Utica (town), Oneida (county), N. Y. (State).

My claim is:

If totally disabled: From what date? —— —, 191—. Are you now disabled? Yes. If not, on what date were you able to return to work? —— —, 191—. If still disabled, how long do you estimate disability will continue? Don't know.

If mutilated: Thumb? —. First finger? —. Second finger? —. Third finger? —. Fourth finger? —. Phalange of thumb or finger? —. If so, which? —. Great toe? —. Other toe? —. Phalange of toe? —. Of which? —. Hand? —. Arm? —. Foot? —. Leg? —. Eye? —. Both eyes? —. Did you suffer loss of the member, or loss of use of the member? —. If loss of use, is such loss temporary or permanent? —.

If partially disabled: From what date? —— —, 191—. Are you still so disabled? —. If not, on what date did disability cease? —— —, 191—. If still partially disabled, how long do you estimate disability will continue? —. By how much have your daily earnings been reduced by this injury? — and for such other and further relief as I may be entitled to in consequence of such

10 injury.

In proof of such claim I make the followinig statements:

Place of Accident.

Location of plant where accident occurred. 405 Washington St. (Street and number).

In what city or village? Utica. County? Oneida.

If away from employer's premises or plant, state where accident happened. —.

The Injured Employee.

Full name of injured employee? Mrs. Elizabeth Vaughn.

Address? 716 Noyes St., Utica, N. Y. (Street and number, city or village and county).

Sex? Female. Age? 46. Do you speak English? Yes.

If not, what language? —. Are you married or single? Married.

Where were you born? Richfield Springs.

State occupation when injured? Assistant forelady. How long have you worked at this occupation? 22 years. How long have you worked for your present employer? About 3 months.

Were you doing your regular work when injured? Yes. Piece or time worker? Time. Wages, or average earnings, per day? $2.00.

Describe how accident occurred. Helping girl in factory locate screw from machine. While on floor electricity drew my hair into a shaft, removivng scalp.

Were safeguards provided? —. If so, was accident caused by removal of any safeguard? —.

Was your eyesight or hearing defective? —.

11 Medical Attendance.

Did you request your employer to provide medical attendance? Yes. Has he done so? Yes. What physician attended you? Dr. A. R. Grant. Address of physician: 321 Genesee St., Utica, N. Y.

Were you sent to hospital? Yes. If so, name and address of hospital? Homeopathic.

Where are you now? Homeopathic Hospital, Utica.

If married, give full name, address, and age of wife or husband: Stephen F. Vaughn, 716 Noyes St., Utica, N. Y.

If living with mother or father, give their name and address ——.

I hereby agree to accept the compensation awarded by the State Workmen's Compensation Commission in lieu of any other right or cause of action which I may have against any person, firm or corporation, in consequence of such accident; and, in consideration of such compensation, if any, when awarded, I hereby assign and set over unto the State Workmen's Compensation Commission, for the benefit of the State Insurance Fund, if compensation be payable therefrom and otherwise to the person or association or corporation liable for the payment of such compensation, all my right, title, and interest, if any, in such cause of action for such injury, loss, or damage against any person, firm, or corporation.

Signed, this 25th day of July, 1917, at Utica, N. Y.

(Injured employee making claim, sign full name here): Elizabeth M. Vaughn.

(Give address to which mail should be sent): 716 Noyes St.

12 STATE OF NEW YORK,
County of Oneida, ss:

On this 25th day of July, 1917, personally appeared before the undersigned, a Notary Public in and for the said County and State, the above named Elizabeth M. Vaughn, to me well known, and to whom I have read the foregoing questions and answers, and all the matter above stated, and who, after being fully advised in the premises, subscribed his name hereto in my presence, and made oath that the foregoing statements, and each and all of them, are full and true, and are made without reservation or concealment.

[SEAL.] RITCHIE J. PEGG.

Post-office address, 2 Clairmont Terran, Utica, N. Y.

Notice of Award.

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

Syracuse Office: 428 South Salina Street.

Claim No. 35470 S.

Date, Sept. 31st, 1917.

To Clark Knitting Co., Employer, 405 Washington St., Utica, N. Y.; and Elizabeth Vaughan, Employee, 716 Noyes St., Utica, N. Y.; and Ætna, Insurance Carrier:

You are hereby notified that at a meeting of the State Industrial Commission held September 20th, 1917, a decision and award of compensation was made in the above matter, as follows:

13 $169.18 for 22 weeks' disability at $7.69 per week (this does not include first two weeks for which compensation is payable only in cases in which disability has lasted more than forty-nine days,) and the case was continued during disability.

The employer is hereby directed, in accordance with the provisions of the Workmen's Compensation Law, to pay the above award to the employee in the following manner: $169.18 at once for period from 4-23-17 to 9-24-17, and the balance (if any) periodically, in accordance with the method of payment of wages of the employee at the time of injury.

The above copy of the decision and award is sent to you pursuant to sections 20 and 23 of the Compensation Law.

STATE INDUSTRIAL COMMISSION.
JOHN MITCHELL, *Chairman*

Attest:
WILLIAM S. COFFEY, *Secretary,*
By J. A. PITTS, *For Chief of Claims.*

(NOTE.—Correspondence should be addressed to 428 South Salina Street, Syracuse, N. Y.)

(To the Claimant: Call at the office of the insurance carrier given above to collect the amount of award.)

14 *Hearing Nov.* 14, 1917, *Before Deputy Commissioner W. C. Richards at Utica, N. Y.*

Claim No. 35470.

Claimant: Elizabeth Vaughan.

Carrier: Ætna Life Insurance Company.

Appearances:

For Claimant, Attorney W. F. Dowling.
For Carrier, Attorney W. H. Foster.
H. M. Halloran, Hearing Stenographer.

By Deputy Commissioner Richards: The question to be considered in this case is the extent of disability. We proposed an award and notified the claimant of $169.18 for 22 weeks, carrying her compensation to September 24th, 1917.

By Mr. Foster: We have been paying her right along.

By Deputy Commissioner Richards: Evidently the award was not understood by the claimant, as she objects on the ground that the award is not sufficient. We simply made an award and continued it during disability. What is your further contention in the case, Attorney Dowling?

A. This is a case of practical permanent disability.

Q. Have you any contention only that?

A. That she is very seriously disfigured; she is compelled to wear false hair, and her neck is torn very badly on the side, and her face is discolored.

By Deputy Commissioner Richards:

15 Q. What have you to say, Mr. Foster?

A. I understand it is very serious.

Mrs. Elizabeth Vaughan sworn.

By Deputy Commissioner Richards:

Q. You are Mrs. Elizabeth Vaughn?
A. Yes.
Q. Your husband is living?
A. Yes.
Q. You are living with him?
A. Yes.
Q. You have no children?
A. No.
Q. You received an accidental injury on April 9th, 1917?
A. Yes.
Q. Have you recovered from that injury?

A No.
Q. You haven't returned to work?
A. I can't do my own work around the house.
Q. Your wages at that time were $2.00 a day?
A. Yes.
Q. Are you being paid compensation regularly?
A. Up until October 22nd—that was the last I received.
Q. What was the nature of the injury you received?
A. My scalp was torn off. The electricity drew my hair into the shaft; this shaft was in the mills of the Clark Knitting Company.
Q. What condition did that leave you in?
A. My face is disfigured.

By Mr. Dowling:

Q. At the present time, you are not even able to do your own housework?
A. No. I can't stoop over.
16 Q. You continue to suffer pain?
A. In my limbs.
Q. What about your nervous condition?
A. I am over nervous.
Q. You find that if you try to walk very far or anything excites you, you get very weak?
A. I have to take care most of the time.
Q. Would you be able to stand at a machine?
A. No.
Q. You suffer discomfort with your head?
A. Not with my head as much as my limbs.
Q. I notice your face is very dark,—previous to the accident you were fair complexion?
A. Yes.
Q. And you didn't have that dark color to your skin?
A. No.
Q. Your ear, your left ear was torn away, brought down on the neck?
A. Yes.
Q. Almost to the breast?
A. Yes.
Q. That has left a permanent scar on the left side of your neck?
A. Yes.
Q. Extending for several inches?
A. Yes.
Q. And also extends to the apex of the chin?
A. Yes.
Q. Have you any other marks on your neck?
A. No.
Q. Your hair with the exception of a very little in front of your head is entirely gone?
A. Also the skin.
Q. Whether or not the scalp was grafted?

A. Yes.

17 Q. And the skin taken from your left leg?

A. My both limbs.

Q. That has left a permanent disfigurement on your limbs?

A. Yes.

By Mr. Dowling: We claim that where the skin is removed that is part of the disability.

Q. Where the skin is removed from your legs, you still suffer from the effects of it?

A. Yes.

Q. That is true of both limbs?

A. Yes.

Q. Prior to this accident, were you in good health?

A. Yes.

Q. And working every day in the mill, and doing your housework at night?

A. Yes.

Q. You are how old?

A. 46.

Q. You are a married woman?

A. Yes.

Q. Have you a family?

A. No.

Q. How long were you confined to the hospital?

A. 22 weeks.

Q. You haven't been able to do any work since you were injured?

A. Peel a few potatoes and make a cup of tea,—I can't do any sweeping or washing or ironing.

Q. Nor lifting?

A. No.

Q. You were compelled to get false hair?

A. Yes.

Q. It is necessary for you to wear that?

A. Yes.

Q. Your eyesight is affected?

A. My left eye is a little weak; this eyebrow (left) was drawn way up.

Q. The eyebrow over the left eye was drawn up as a result of the accident?

A. Yes.

18 Q. Do you think of anything else that you suffered that you haven't described here?

A. No.

By Mr. Foster:

Q. How long had you been working?

A. From the 7th of January, 1917? Prior to that I hadn't worked for some time, I had been at home.

Q. Why hadn't you been working?
A. Several years ago I had a severe burn on my left arm, and my arm wasn't very strong, so I stayed home for a while.
Q. About how many years did you stay home from the result of your arm?
A. Seven years.
Q. So when you stated a few months ago that your health was good, you were mistaken?
A. I was not sick with it, that has nothing to do with this accident. After my arm was healed up I was perfectly well.
Q. But you hadn't worked for seven years?
A. No.
Q. Your arm had nothing to do with the fact that you didn't go to work?
A. No.
Q. Some months before the accident, you determined you would go to work?
A. Yes.
Q. For how long a time after you received the burn, were you laid up?
A. Eleven months.
Q. That healed up and you were all right?
A. Yes.
Q. Did that have any effect on your nervous condition?
A. No.
Q. You had entirely recovered?
A. Yes; I was perfectly well.
19 Q. How did you receive that burn?
A. Blacking a stove.
Q. You want to testify that as a result of that eleven months' suffering, your nervous condition was not in any way affected?
A. I didn't say that—I have always been a little nervous, but not as bad as now.
Q. To all practical purposes, you recovered from that burn at the end of 11 months?
A. I was perfectly well,—I gained in flesh.
Q. You were able to do your housework?
A. Yes.
Q. You were able to go around and do all those things?
A. Yes; the only thing I can't reach up high with that arm.
Q. You could work in the mill?
A. Yes.

Dr. A. R. GRANT, sworn:

By Mr. Dowling:

Q. You reside in Utica, doctor?
A. Yes.
Q. You are a duly licensed physician and surgeon?
A. Yes.

Q. You remember being called to attend Mrs. Vaughn?
A. Yes.
Q. What date were you called?
A. 9th of April.
Q. 1917?
A. Yes.
Q. Where did you go to see her?
A. At the Homeopathic Hospital.
Q. Will you describe her condition?

A. She had complete avulsion of scalp starting at the mar-
20 gin of her hair over her brows, and both her ears were torn off, one hanging on the breast.

Q. One hung on her breast?

A. Yes; and an effort was made to control the hemorrhage and revive her. We worked over her a good many hours to restore her vitality and save her life, and she finally rallied from the shock and severity of her injury. The scalp was not only torn, but in large areas the brain was bare of any covering, therefore making it difficult to form a new skin over the skull. We got the infection free from the wound by antiseptic treatment. We began the skin grafting under anesthesia which could be done sometimes once in two weeks, sometimes once in three weeks or four according to her condition. Her condition was very grave all through the early weeks of her confinement; her heart was bad; she carried a temperature that averaged 101½—from 99½ to 103, and her condition was very precarious all through that period, but eventually after repeated grafting—I think we grafted her head seven or eight times, and each time we put on from 50 to 75 and sometimes 100 individual grafts. Just a point that bears on the case so far as the person is concerned and her usefulness is concerned—these grafts had to be the full thickness of the skin—an ordinary graft won't take on an injury of this kind—it had to be a full thickness graft, and so that the disability she has and which she complains of is largely due to the necessity of taking full thickness of the skin down to the fat to make a scalp that will stand the least bit of pressure or will not break down and slough off. We believe we now have a
21 scalp that will be permanent with very little care. I think altogether there were several hundred grafts, over 525 grafts. This is a general statement of the wound and the method of endeavoring to bring her back to a condition of usefulness.

By Deputy Commissioner Richards:

Q. Doctor, we would like to know what is the probable duration of her disability following her condition, what is the prognosis of her case as far as it relates to her disability, as to being able to work and engage in the occupation she formerly engaged in?

A. I have to modify the answer to that question, Mr. Commissioner, in this way—she has developed a heart and kidney trouble as a result of anæsthetics, a shock and disturbance of her skin area, showing she has more or less chronic Bright's Disease, which is go-

ing to influence her future vitality and life—she is more or less permanently injured.

Q. Then would you be able to state definitely in relation to the prognosis of her case, in reference to her being able to work at a future time?

A. I would not.

By Mr. Dowling:

Q. She is to all practical purposes permanently disabled?

A. Yes.

Q. Whatever change there may be in her ability to work must be determined in the future, after a considerable length of time, isn't that so?

A. It is problematical.

Q. All these various complications you have described, in
22 your opinion, grew out of this injury and necessary treatment she had to undergo?

A. I hadn't examined Mrs. Vaughan within a number of years before she had this injury; I hadn't examined her immediately before her injury, and to say that the present condition of her heart and arteries and blood vessels and kidneys were due entirely to the injury, I could not say that positively.

Q. From the nature of her injury, and from the treatment she had to undergo, and from the vitality which she displayed in responding to the treatment, could you express an opinion as to whether or not those conditions might have grown out of the injuries received and necessary treatment following?

A. I would say they could have resulted from the injuries and subsequent treatment and anæsthetics she had to go through.

Q. Would you say after having heard Mrs. Vaughan testify that she was in good health and her nervous condition was all right, and from the vitality she displayed in responding to treatment which you gave her, in your opinion, it is probable that these complications did grow out of that?

A. I would not answer that; I don't know.

Q. Whether or not, doctor, the claimant suffered considerable loss of blood as a result of this accident between the time she was injured and before you got the hemorrhage checked?

A. Certainly.

Q. That, of course, would reduce her vitality, would *n*it not?

A. Yes.

Q. Whether or not she suffered a very severe shock, a nervous shock, as the result of the accident?

A. Extreme.

23 Q. Was she unconscious at the time you saw her first?

A. I think she was slightly conscious, but was put under an anæsthetic righ- away. I think she responded to questioning; I think she did before she was anæsthetized.

Q. This skin which you removed, was removed from the lower extremities, from the legs?

A. The upper extremities of both thighs, above the knees.
Q. Whether or not severe permanent scars remain there?
A. Very severe, and of course, permanent.
Q. The removal of that skin and tissue would impair the usefulness of the legs?
A. Not the usefulness of the legs as a moving power so much as the consciousness of constant pathological condition there. Removing a large quantity of skin is hard on the system whether by a burn or not. Lessening the amount of skin surface affects the action of the kidneys. The skin is a third kidney, and if the kidneys with normal functions haven't the skin of the body to help eliminate it is a well known fact that the kidneys are impaired.

By Mr. Dowling:

Q. Could that be considered to be one of the causes for her present kidney trouble?
A. It positively is in my judgment.
Q. Where you took the skin off the legs, does nature replace it?
A. This sort of a graft is different from the ordinary graft which is superficial; this graft goes through to the fat, and nature can't replace it as it was before.

24 By Mr. Foster:

Q. Nature can to a certain extent?
A. No.
Q. How long was this patient in the hospital?
A. Over 20 weeks, from April to some time in September.
Q. Considering the seriousness of the injury, do you think she is making a remarkable recovery?
A. To the present time.
Q. You consider that her condition will improve?
A. I hope so.

To Claimant:

Q. Does your husband work?
A. Yes.
Q. Is he in good health?
A. Yes.
Q. And works regularly?
A. Yes.
Q. Do you own your own home?
A. No.
Q. You rent it?
A. Yes.
Q. Have you any money in the bank?
A. A little towards a home.
Q. What is your present age?
A. Born in 1868.

By Deputy Commissioner Richards: We will carry claimant on disablity. After that time we will take up the question of serious facial and head disfigurement, and make her an award on that basis.

Q. Where have you been getting your compensation?
A. Through Mr. Clark.
Q. You get it every week?
A. I used to get it every Thursday morning.

By Deputy Commissioner Richards: Carrier is paying regularly. Direct Carrier to continue paying during disability. At the expiration of disability or at any time agreeable to both claimant and carrier, the question of adjustment can be taken up and considered.

Notice of Award.

Nov. 14, 1917.

Claim No. 35470.—Eliz. Vaughan.

To Mrs. Elizabeth Vaughan, 716 Noyes St., Utica, N. Y.; Ætna Life Insurance Co., First National Bank Bldg., Syracuse, N. Y.; Clark Knitting Co., Inc., Employers, Utica, N. Y.:

On November 14th, 1917, a special hearing of the above claim was held at the Court House, Utica, N. Y., before Deputy Commissioner W. C. Richards. There appeared at the hearing:

Mr. W. H. Foster represented the Carrier.

Mrs. Elizabeth Vaughan, Claimant.

Carrier is paying regularly. Direct Carrier to continue paying during disability. At the expiration of disability or at any time agreeable to both claimant and Carrier, the question of adjustment can be taken up and considered.

This notice is sent you pursuant to Sections 20 and 23 of the Compensation Law,

Very truly yours,

STATE INDUSTRIAL COMMISSION,
—— ——, *Deputy Commissioner.*

W. C. R./H.

Hearing Jan. 31, 1918, *Before Commissioners Louis Wiard and James M. Lynch.*

Claim No. 35470.

Employee, Elizabeth Vaughan.

Employer, Clark Knitting Co.

Carrier, Ætna Life Insurance Co.

Special Hearing held at the Cahill Bldg., Syracuse, N. Y., January 31, 1918.

Appearances:

Mrs. Elizabeth Vaughan, Claimant.
Mr. W. F. Dowling, Attorney for Claimant.
Mr. Wm. H. Foster, Attorney for Carrier.
M. F. Quinlan, Hearing Stenographer.

Mrs. ELIZABETH VAUGHAN:

By Commissioner Lynch:

Q. Where did the accident occur?
A. At the Knitting Mill in Utica.
Q. What happened?
A. I had my scalp torn off.
Q. How old are you?
A. 46.
Q. Married.
A. Yes.

What have you in mind, Mr. Dowling?

By Mr. Dowling: It seems to me we ought to have pretty near full amount. This woman is a young woman.

By Mr. Foster: How are you going to make an award without having it concurrent. We are paying compensation for disability. There is no doubt in my mind that this woman is not able to go back to work. We are paying compensation.

27 By Commissioner Lynch: What has an award for disfigurement got to do with disability?

By Mr. Foster: That is the question. If it is a concurrent award it cannot be made.

By Mr. Lynch: What effect would a concurrent award have in a case like this? For instance, you are liable to this claimant for some amount that you have got to pay. It does not make any difference so far as disability is concerned.

By Commissioner Wiard: If there were two thumbs off, you would not have to pay for both at the same time. You would pay for one and then go on after and pay for the other. Here you have disfigurement which you have got to pay for in addition.

By Mr. Foster: My contention is that it was put in the law to take care of certain cases which were not taken care of under the original law, you had specific injuries and disability, but there might be a case where disfigurement would diminish or impair their earning capacity.

I do not know whether you are familiar with the case of Erickson vs. Preuss. It is a case which I argued in the Appellate Division last term, only a couple of weeks ago. It is a case where a woman working in a laundry had her scalp torn off. What the Appellate Division are going to do, I do not know. It does not seem to

28 me that it is supposed to be double indemnity. I hold that the theory of the law is based on loss of wages due to injuries received as a result of industrial occupation.

By Commissioner Wiard: Do I understand that you are paying compensation now?

By Mr. Foster: I am. I am not contending that this woman is able to work. I do not think any woman who has gone through what this woman has could go back to work at the present time.

By Commissioner Wiard to Claimant: How long ago was your accident?

By Mrs. Elizabeth Vaughan: April 9th. I was in the hospital until September.

By Commissioner Wiard: There will come a time when she is going to be able to work and, if I am right on the position I have taken—I am not saying I am right on the position I have taken, I may be wrong, but if I am right—when she is able to return to work her disability ceases and the award for disfigurement begins.

By Mr. Dowling: Dr. Grant, who took care of this woman, says she will never be able to work again. When her scalp was torn off, it was torn down to the bone so that it was necessary to graft flesh and skin from her legs. There were 525 pieces removed with the result that her kidneys are affected. A substantial portion of the skin has ben removed and the functions of the kidneys interferred with. Of course she had a terrific shock. I think Dr. Grant has testi-
29 fied that she is undoubtedly permanently disabled. He has examined her since and I think he still adheres to that opinion.

By Mr. Foster: It seems to me we had better continue paying compensation and take that question up later.

By Mr. Dowling: I think there is no doubt but that this is total disability.

By Mr. Foster: It seems to me that the theory of the Compensation Law is for the loss of being able to labor.

By Commissioner Lynch: The Carrier is directed to continue paying compensation during disability. The matter of facial disfigurement will be brought up when disability ceases.

By Mr. Dowling: When this accident happened, the employer sent her to the hospital and had them give her the best room in the house. She continued in that room. She did not understand the law. She understood that the carrier was to pay all those bills. If the bills are approved as given, it involves her with a very large bill, something over $800.

Mr. Clark, the head of the knitting mill where she worked, said that of course he did not believe the company was liable for these hospital bills, but he thought they ought to be adjusted by the carrier because they were ordered in good faith. It puts us in the
30 situation where this lady went in there with the understanding that the carrier or the employer would stand the bill.

By Mr. Foster: You do not know that Dr. Grant did not understand that under the law the carrier paid for only the first sixty days.

By Commissioner Lynch: If it had been a question of getting this woman back to work, Mr. Foster, you would have gotten this woman there.

By Mr. Dowling: This woman was in such a condition that it was

necessary to keep her in a large airy room, because of the frequent dressings she had to be absolutely quiet and get the best of air and sunshine. There were days and days when she was not expected to live.

By Deputy Commissioner Richards: If the carrier stands on the technical ground of sixty day period then the bills involve this claimant. That would leave a balance of $800. This woman is drawing only $7.69.

By Commissioner Lynch: I think the question would then arise as to the power of the Commission to make an award against the employer. This claimant did not engage the room.

By Commissioner Wiard: The medical and hospital bills will be taken up at a special hearing in Utica before Deputy Commis-
31 sioner Richards. All parties to be notified. Employer and carrier should be at the hearing.

By Mr. Dowling: I assume that if this case which Mr. Foster has in court is decided against him that the claimant is entitled to an award for facial disfigurement and your decision can be modified.

By Mr. Foster: If this is a case of total disability; the case that is now in the Appellate Division is not on all fours.

By Commissioner Wiard: Dr. Grant, the question was raised as to whether or not you knew of the provision of sixty day period allowance of hospital and medical bills. The whole matter has been referred for a special hearing in Utica with the idea of having Commissioner Richards write a letter to the employer setting forth the facts, that this woman would have to meet about $800.00 for medical bills, and to ascertain whether or not he did not feel obligated inasmuch as the information we have is to the effect that at the time of the accident he called the hospital and told them to give this woman the best possible treatment and also the best room in the house.

Dr. A. R. Grant: That is true, sir. He would be very glad to assume that I am sure. I understand he has been advised not to pay any attention to his natural sympathetic bend.

By Commissioner Wiard: This is a sympathetic case. She
32 had a frightful injury. We cannot give her anything for facial disfigurement so long as she is disabled. If she is able to go to work, and goes to work, then we can award her as much as $3,500.00 which the Commission probably would.

By Commissioner Lynch:

Q. What do you think of her ever being able to work, Dr. Grant?

A. She will never be able to. She is intensely nervous. If her work is light she would be able to live at home. She should not do any regular intensive work. Her kidneys show no albumen. The nervous system, which is really the driving power, is considerably impaired and I think permanently so. She may be able to work a few days at a time but so far as working regularly, I do not think she can.

By Deputy Commissioner Richards: The only thing is whether

or not she would be benefited more by an award for serious facial disfigurement than on permanent disability.

By Dr. Grant: She will have to be under continued observation. A lot of that bone is bare. Mr. Clark has not paid any money yet. He will do anything you gentlemen suggest to settle this. I think he would make a requisition on his finances.

By Commissioner Wiard: We also want to get to the point of the question of reasonableness of the hospital and doctor's bills.

By Dr. Grant: The operation proper—I was called at about 7 o'clock in the morning and worked constantly until along in
33 the afternoon. Her ears were hanging down. Her life was dispaired of for days and days. That $100.00 represents one day's constant attendance. She was on the table over two hours. I should have charged $500.00. The charges of $25.00 for grafting are minor and I do not think they should be cut down. The ordinary skin graft is a thin graft just scaled off. These grafts, to make a scalp, had to be full thickness down to the fat. In ordinary burns we can graft with a thin layer. It was a labor-ous process. I think we put on 70, 80, 90 to 110 pieces at each sitting—as much as she was able to stand and as much area as we could cover. It is a great responsibility—like taking out a stomach. For the same time and for an operation that required equal surgical skill, I would have charged $100.00 every time I did that. You understand these slippery little pieces were put on the skull which was slippery like glass or ice. It was on the head and the patient was so very ill she could not sit up. The least touch would spoil it all. It could not be covered with bandages, that destroys the ability of the graft to take. You cannot sew it. There must not be a drop of blood. You can see how important the nurses were and the dressings. It was very important to keep the patient from rolling her head. She was very near exhausted and very weak. If she moved her head, it pushed the ends up and spoiled it all. It meant constant supervision in our efforts to have her at rest. She had to have the best and we were careful of giving it to her and did give it to her regardless of
34 the Commission. The expenses are trifling considering the attention given her by myself and the hospital attendants. She had to have a private room. In a ward, friends coming to visit other patients would have disturbed her.

By Deputy Commissioner Richards: At this hearing in Utica at which time you are going to get the employer in there, supposing he does not consent to go beyond the sixty days and the carrier does not go beyond the sixty days, you should have your bills passed upon for payment by the claimant. I think the Commission will concede that your bills are reasonable.

Notice of Award.

Feb. 2, 1918.

Claim 35470—Elizabeth Vaughan.

To Clark Knitting Co., Inc., Utica, N. Y.; Mrs. Elizabeth Vaughan, 716 Noyes St., Utica, N. Y.; Ætna Life Insurance Co., Union Bldg., Syracuse, N. Y.:

On January 31, 1918, a special hearing of the above claim was held at the Cahill Bldg., Syracuse, N. Y., before Commissioners Wiard and Lynch. There appeared at the hearing:

Mrs. Elizabeth Vaughan, Claimant.
Mr. W. F. Dowling, Attorney for Claimant.
Mr. W. H. Foster, Attorney for Carrier.
Dr. A. R. Grant, Attending Physician.

35 The carrier is directed to continue paying compensation during disability. The matter of facial disfigurement will be brought up when disability ceases.

The medical and hospital bills to be taken up at a special hearing in Utica before Deputy Commissioner Richards. All parties to be notified. Employer and carrier should be at the hearing.

This notice is sent you pursuant to Sections 20 and 23 of the Compensation Law.

Very truly yours,

STATE INDUSTRIAL COMMISSION.
W. C. RICHARDS,
Deputy Commissioner.

W. C. R./M. F. Q.

Hearing May 23, 1918, *Before Commissioner James M. Lynch.*

Claim No. 35470.

Employee, Elizabeth Vaughan.

Employer, Clark Knitting Co.

Carrier, Ætna Life Insurance Co.

Special Hearing held at the Cahill Bldg., Syracuse, N. Y., May 23, 1918.

Appearances:

Mrs. Elizabeth Vaughan, Claimant.
Mr. W. F. Dowling, Attorney for Claimant.
Mr. W. H. Foster, Attorney for Carrier.
M. F. Quinlan, Hearing Stenographer.

Commissioner Lynch to Mrs. Vaughan: Do I understand that you are still drawing compensation?

36 By Mrs. Vaughan: Up until two weeks ago. May 6th was the last I got.

Commissioner Lynch to Mr. Foster: Now, Mr. Foster, how about these medical bills?

By Mr. Foster: I do not see why we should pay these bills beyond the sixty day period. They are very big bills even for just the first sixty days.

By Mr. Dowling: For the first sixty days the hospital bills were $329.95. The balance of the hospital bill was $440.08. This woman was in a very serious condition and she had to have a special room.

By Commissioner Lynch: It seems to me that if somebody besides the claimant would take this up there might be a considerable reduction in these bills.

By Mr. Foster: I took that up with Dr. Grant. He seems to think the bill is all right. We make no question on the payment of the wig.

Superintendent of the Utica Homeopathic Hospital:

By Commissioner Lynch:

Q. Mr. Foster has raised the question as to the price of the room occupied by Mrs. Vaughan.

A. It was a corner room. I think that is a very reasonable price for a room of that size and convenience. It was considered necessary for her to have such a room. Of course that is not for us
37 to say, it is for the doctor to decide what kind of a room she should have.

By Mr. Dowling: Mr. Clark, the head of the knitting company, ordered that she have the best in the house and aside from that she was in such a serious condition that Dr. Grant ordered that she have a quiet and airy room.

By Commissioner Lynch: I am not raising the question but what she should have had the very best attention.

By Mr. Foster: The question I raise is that in other cities, even in New York, they do not charge $30 a week for rooms.

By Superintendent of Hospital: It is the usual charge for that room.

By Commissioner Lynch: All I can do is to make an award for medical attention and appliances and hospital bills for the first sixty days. Dr. Grant said if it was not paid otherwise that your employer would pay the charge. Do you know anything about that, Mrs. Vaughan?

By Mrs. Vaughan: Only what they said here that day. My husband went down to see Mr. Clark about having me moved to another room and he said I could not be removed.

By Mr. Dowling: Mr. Clark told me that he expected the carrier to pay the entire bill.

38 By Commissioner Lynch: He may expect him to but there is no legal obligation.

An award is made for Three Thousand, Five Hundred Dollars, $3,500.00, for facial disfigurement on the decision of the Court of Appeals in the case of Erickson vs. Preuss. The carrier is directed to pay this amount in one check and to continue payments for disability. Carrier is also directed to pay medical and hospital bills as approved for the first sixty days.

By Mr. Foster: I object to the making of any award on the ground that the amendment to Subdivision 3 of Section 15 of Chapter 622 of the Laws of 1916, providing for serious facial disfigurement is unconstitutional in that it assesses damages without the right of a trial by jury in addition to providing compensation for disability.

2nd. It is unconstitutional in that it is contrary to the Constitution of the United States and to the Constitution of the State of New York in that it takes property without due process of law.

3rd. The Compensation Law of the State of New York being a compulsory act, compensation cannot be awarded for disability and additional compensation for damages for disfigurement in violation of the Constitution of the United States and the Constitution of the State of New York.

4th. Chapter 622 of the Laws of 1916 added to Section 15, Subdivision 3 of the workmen's Compensation Law of the State of New York is unconstitutional and void.

39 By Commissioner Lynch: Attorney's fee approved at $100.00.

Notice of Award.

June 12, 1918.

Claim 35470—Elizabeth Vaughan.

To Mrs. Elizabeth Vaughan, 716 Noyes St., Utica, N. Y.; Clark Knitting Co., Utica, N. Y.; Ætna Life Insurance Co., Union Bldg., Syracuse, N. Y.:

A special hearing of the above case was held at the Cahill Bldg., Syracuse, N. Y., on May 23, 1918, before Commissioner James M. Lynch. There appeared at the hearing:

Mrs. Elizabeth Vaughan, Claimant.

Mr. W. F. Dowling, Attorney for Claimant.

Mr. W. H. Foster, Attorney for Carrier.

An award was made for Three Thousand, Five Hundred Dollars, $3,500.00, for facial disfigurement on the decision of the Court of Appeals in the case of Erickson vs. Preuss. The carrier was directed to pay this amount in one check and to continue payments for disability. Carrier was also directed to pay medical and hospital bills as approved for the first sixty days. Claimant's attorney's fee was approved at $100.00.

This notice is sent you pursuant to Sections 20 and 23 of the Compensation Law.

STATE INDUSTRIAL COMMISSION.
JAMES M. LYNCH,
Commissioner.

J. M. L./M. F. Q.

40 *Conclusions of Fact, Ruling of Law, Award, and Decision.*

State Industrial Commission.

Claim No. 35470.

In the Matter of the Claim for Compensation, under the Workmen's Compensation Law, Made by ELIZABETH VAUGHAN

against

CLARK KNITTING CO., INC., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier.

On April 9, 1917, Elizabeth Vaughan received her injuries. Thereafter this claim came on for hearing on September 20, 1917, at Syracuse, New York, and on November 14, 1917, at Utica, New York. At the hearing held on September 20, 1917, an award of compensation was made to the claimant at the rate of $7.69 weekly to be continued during the disability suffered by the claimant. At the hearing held on November 14, 1917, it appeared that compensation was being regularly paid to the claimant. Further hearing was held at Syracuse, New York, on January 31, 1918, to consider the facial and head disfigurement, at which time the employer and insurance carrier were directed to continue the payments of com-
41 pensation to the claimant during disability. Further hearing was held on May 23, 1918, at Syracuse, New York, on which date an award was made for $3,500.00 for serious facial and head disfigurement, based on the decision of the Court of Appeals in the case of Erickson vs. Preuss. In objecting to the award for serious facial and head disfigurement, the attorney for the employer and insurance carrier raised the question of the constitutionality of Subdivision 3 of Section 15 of the Workmen's Compensation Law under which the award was made.

Appearances:

Robert W. Bonynge, Esq., Counsel to State Industrial Commission.
William H. Foster, Esq., Attorney for Employer and Insurance Carrier.
W. F. Dowling, Esq., Attorney for Claimant.

All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its Conclusions of Fact, Ruling of Law, Award and Decision, as follows:

Conclusions of Fact.

1. On April 9, 1917, the day when Elizabeth Vaughan received her injuries, she resided at No. 716 Noyes Street, Utica, New York, and was employed by Clark Knitting Co., Inc., engaged in the manufacture of knit underwear, with a plant or place of business located at No. 405 Washington Street, Utica, New York. Elizabeth
42 Vaughan was employed as a neck cutter in the operation of a machine in the finishing department.

2. On said date, Elizabeth Vaughan was working for her employer at her employer's plant, and while engaged in the regular course of her employment, in stooping to procure a screw belonging to the bar of a machine operated by another employee, her hair was caught in a revolving shaft, which removed the scalp from hair line over frontal area to the seventh vertebra behind the ears, and which said injuries disabled her from the date of said accident to May 23, 1918, and on that date she was still disabled.

The injuries received by Elizabeth Vaughan on said date also resulted in serious facial and head disfigurement.

3. The average weekly wage of Elizabeth Vaughan was the sum of $11.54.

4. The injuries sustained by Elizabeth Vaughan were accidental injuries, and arose out of and in the course of her employment.

5. It does not appear whether written notice was given to the employer within ten days after disability, but it has not been established as a fact that such written notice was not given, and it is, therefore, presumed under Section 21 of the Compensation Law, that sufficient notice was given. On the other hand, neither employer nor insurance carrier was prejudiced by the failure, if any, to give written notice of injury within ten days after disability.

43

Ruling of Law.

This claim comes within the provisions of Chapter 67 of the Consolidated Laws, being Chapter 816 of the Laws of 1913, as reenacted and amended by Chapter 41 of the Laws of 1914, and amended by Chapter 316 of the Laws of 1914, and as further amended by the Laws of 1915 and 1916, known as the Workmen's Compensation Law.

Award.

Award of compensation is hereby made against Clark Knitting Co., Inc., Employer, and Ætna Life Insurance Company, Insurance Carrier, to Elizabeth Vaughan, injured employee, in the sum of $3,500.00 on account of and in view of the serious facial and head disfigurement resulting from the injuries sustained on April 9, 1917; and this claim is hereby continued for further hearing to determine the extent of disability resulting from said accident; the fee of W. F. Dowling, Esq., attorney for claimant, is approved in the sum of $100.00, which is to be made a lien on this award.

Decision.

It is presumed under Section 21 of the Compensation Law that sufficient notice of injury was given to employer. On the other hand, the failure, if any, to give written notice of injury to the employer within ten days after disability is hereby excused on
44 the ground that neither employer nor insurance carrier was prejudiced by such failure, if any.

Dated May 23, 1918.

STATE INDUSTRIAL COMMISSION.
EDW. P. LYON,
Vice-Chairman;
HENRY D. SAYER,
JAMES M. LYNCH,
Commissioners.

Affidavit of No Opinion.

Supreme Court, Appellate Division, Third Department.

Before State Industrial Commission.

In the Matter of the Claim of ELIZABETH VAUGHN, Claimant-Respondent, for Compensation under the Workmen's Compensation Law

against

CLARK KNITTING CO., INC., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

STATE OF NEW YORK,
County of Onondaga, City of Syracuse, ss:

Charles H. Goebel, being duly sworn, deposes and says that he is a clerk in the law office of William H. Foster, attorney for
45 the defendants-appellants herein, and is familiar with this file; that no opinion was rendered by the State Industrial Commission in making the award of compensation herein.

CHARLES H. GOEBEL.

Sworn to before me this 20th day of August, 1918.

F. I. OLMSTEAD,
Notary Public.

Certification of Record.

I, William S. Coffey, Secretary of the State Industrial Commission, do hereby certify that I have compared the foregoing papers, except the Statement under Rule 41, with the respective originals thereof on file in the office of the State Industrial Commission, and

that the same are true and correct copies of said originals and of the whole thereof, and that said papers constituted all of the papers and proceedings herein, including the evidence, which were before said State Industrial Commission in relation to the foregoing claim.

In Witness Whereof, I have hereunto set my hand and the official seal of the State Industrial Commission, on the 20th day of August, 1918.

W. S. COFFEY,
Secretary State Industrial Commission.

46 *Order Settling Case.*

It is hereby ordered that the foregoing case which contains all the evidence introduced at the hearing of this claim, except that stipulated by the parties to be omitted, be and the same hereby is settled as the case herein.

Dated, New York, August 20, 1918.

EDWARD P. LYON,
Vice Chairman State Industrial Commission.

47 *Order of Affirmance.*

At a Term of the Appellate Division of the Supreme Court in and for the Third Department, Held at the Court-house, in the City of Albany, N. Y., Commencing on the 12th Day of November, 1918.

Present: Hon. John M. Kellogg, Presiding Justice; Hon. George F. Lyon, Hon. John Woodward, Hon. A. V. S. Cochrane, Hon. Henry T. Kellogg, Associate Justices.

In the Matter of the Claim of ELIZABETH VAUGHN, Claimant-Respondent, for Compensation under the Workmen's Compensation Law,

against

CLARK KNITTING CO., INC., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

The above-named Clark Knitting Co., Inc., and Ætna Life Insurance Company having appealed from the award of the State Industrial Commission entered in the office of said Commission on the 23rd day of May, 1918, whereby compensation was awarded to the above-named Elizabeth Vaughn, injured employee, in the
48 sum of $3,500.00 on account of and in view of the serious facial and head disfigurement resulting from the injuries sustained on April 9, 1917; and this claim is hereby continued for further hearing to determine the extent of disability resulting from said accident; the fee of W. F. Dowling, Esq., attorney for claimant, is approved in the sum of $100.00, which is to be made a lien on this

award; and said appeal having come on to be heard in this court, and having been argued by William H. Foster, Esq., of counsel for the appellants, and E. C. Aiken, Deputy Attorney General, for the State Industrial Commission, and due deliberation having been had thereon.

Now, on motion of Merton E. Lewis, Attorney General, attorney for the State Industrial Commission, it is;

Ordered, That said award of the State Industrial Commission appealed from be and the same is hereby unanimously affirmed.

[L. S.] JOSEPH H. HOLLANDS, *Clerk.*

49 *Order of the Commission.*

Before State Industrial Commission.

In the Matter of the Claim of ELIZABETH VAUGHN for Compensation under the Workmen's Compensation Law

against

CLARK KNITTING CO., INC., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier.

The above named Clark Knitting Co., Inc., employer, and Ætna Life Insurance Company, insurance carrier, having appealed to the Appellate Division of the Supreme Court in and for the Third Judicial Department, from the award and decision of the State Industrial Commission, made and entered herein on the 23rd day of May, 1918, whereby compensation was awarded the above named Elizabeth Vaughn, in the sum of $3,500, on account of and in view of the serious facial and head disfigurement resulting from injuries sustained on April 9, 1917; to W. F. Dowling, Esq., attorney for claimant, $100.00 the amount of his fee; and the case continued for further hearing; and said appeal having been duly heard by said Court, and the Appellate Division of the Supreme Court having at a term thereof commencing on the 12th day of November, 1918,

50 unanimously affirmed the award and decision heretofore made by the State Industrial Commission, and the papers on appeal herein together with a certified copy of the said order of the Appellate Division having been duly filed; it is

Ordered, That the order of the Appellate Division be and the same hereby is made the order of the State Industrial Commission, and the award heretofore made herein be and the same hereby is affirmed with interest from May 23, 1918, and the case set for further hearing on the 2nd day of December, 1918.

Dated, New York, November 25, 1918.

W. S. COFFEY, *Secretary.*

Notice of Appeal.

Court of Appeals, State of New York.

In the Matter of the Claim of ELIZABETH VAUGHN, Claimant-Respondent, for Compensation under the Workmen's Compensation Law

vs.

CLARK KNITTING CO., INC., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

SIRS: Please take notice that Clark Knitting Company, Inc., Employer, and Ætna Life Insurance Company, Insurance Car-
51 rier, hereby appeal to the Court of Appeals from the judgment and order of affirmance in the Supreme Court, Appellate Division, Third Department, entered in the office of the clerk of the Appellate Division, Third Department, on the 19th day of November, 1918, and also from the order of the State Industrial Commission dated November 25, 1918, and from each and every part of said orders.

Dated Syracuse, N. Y., Dec. 16, 1918.

Yours, etc.,

WILLIAM H. FOSTER,
Attorney for Appellants.

Office & P. O. Address, Union Building, Syracuse, N. Y.

To R. M. Barber, Clerk Court of Appeals, Albany, N. Y.; Joseph H. Hollands, Clerk Supreme Court, Appellate Division, Third Department, Albany, N. Y.; Merton E. Lewis, Attorney General, The Capitol, Albany, N. Y.; Robert W. Bonynge, Counsel State Industrial Commission, 230 Fifth Ave., New York City; Elizabeth Vaughn, Claimant, 716 Noyes Ave., Utica, N. Y.

52 *Affidavit of No Opinion.*

Court of Appeals, State of New York.

Before State Industrial Commission.

In the Matter of the Claim of ELIZABETH VAUGHN, Claimant-Respondent, for Compensation under the Workmen's Compensation Law

against

CLARK KNITTING CO., INC., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

STATE OF NEW YORK,
County of Onondaga, City of Syracuse, ss:

Charles H. Goebel, being duly sworn, deposes and says that he is a clerk in the law office of William H. Foster, attorney for the defendants-appellants herein, and is familiar with this file; that no opinion was rendered by the Appellate Division in affirming the award of compensation herein.

CHARLES H. GOEBEL.

Sworn to before me this — day of Dec., 1918.

F. I. OLMSTEAD,
Notary Public.

53 *Certification of Record.*

I, William S. Coffey, Secretary of the State Industrial Commission, do hereby certify that I have compared the foregoing papers, except the statement under rule 41, with the respective originals thereof on file in the office of the State Industrial Commission, and that the same are true and correct copies of said originals and of the whole thereof, and that said papers constituted all of the papers and proceedings herein, including the evidence, which were before said State Industrial Commission in relation to the foregoing claim.

In witness whereof, I have hereunto set my hand and the official seal of the State Industrial Commission on the — of December, 1918.

W. S. COFFEY,
Secretary State Industrial Commission.

Order Settling Case.

It is hereby ordered that the foregoing case, which contains all the evidence introduced at the hearing of this claim, except that stipulated by the parties to be omitted, be and the same hereby is settled as the case herein.

Dated New York, December —, 1918.

EDWARD P. LYON,
Vice Chairman State Industrial Commission.

54 STATE OF NEW YORK, *ss.*:

Court of Appeals.

Pleas in the Court of Appeals, Held at Court of Appeals Hall, in the City of Albany, on the 8th Day of April, in the Year of Our Lord One Thousand Nine Hundred and Nineteen, Before the Judges of said Court.

Witness, The Hon. Frank H. Hiscock, Chief Judge, presiding.
R. M. BARBER, *Clerk.*

Remittitur, April 9th, 1919.

In the Matter of the Claim of ELIZABETH VAUGHN for Compensation, &c.

Be it remembered, that on the 28th day of December, in the year of our Lord one thousand nine hundred and eighteen, Clark Knitting Company, Employer & ano. the appellants in this cause, came here into the Court of Appeals, by William H. Foster, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And State Industrial Commission, the respondent in said cause, afterwards appeared in said Court of Appeals by Merton E. Lewis, Attorney General, which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

55 Whereupon, the said Court of Appeals having heard this cause argued by Mr. William H. Foster, of counsel for the appellant, and by Mr. E. C. Aiken, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is affirmed with costs, on authority of Matter of Sweeting v. American Knife Co. &c., decided herewith.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division, Third Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

R. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

Albany, April 9, 1919.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER, *Clerk.*

56 At a Term of the Appellate Division of the Supreme Court in and for the Third Judicial Department, Held at the Court-house, in the City of Albany, N. Y., Commencing on the 6th Day of May, 1919.

Present: Hon. John M. Kellogg, Presiding Justice; Hon. George F. Lyon, Hon. John Woodward, Hon. A. V. S. Cochrane, Hon. Henry T. Kellogg, Associate Justices.

In the Matter of the Claim of ELIZABETH VAUGHN for Compensation under the Workmen's Compensation Law against CLARK KNITTING CO., INC., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Appellants.

The above named Clark Knitting Co., Inc., and Ætna Life Insurance Company having appealed from the order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department, made at a Term commencing on the 12th day of November, 1918, which affirmed an award of the State Industrial Commission entered in the office of said Commission on the 23rd day of May, 1918, whereby compensation was awarded to the above named Elizabeth Vaughn, injured employee, in the sum of $3500.00 on account of and in view of the serious facial and head disfigurement resulting from the injuries sustained on April 9, 1917, against which award for facial and head disfigurement appellants, when this cause was before this Court, contended that to make said award would be tantamount to making an award, not for loss of earning power, but for damages, and would, therefore, take the property of appel-
57 lants without due process of law, in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States; and the claim is hereby continued for further hearing to determine the extent of disability resulting from said accident; the fee of W. F. Dowling, Esq., attorney for claimant, is approved in the sum of $100.00, which is to be made a lien on this award; and said appeal having been argued in the Court of Appeals by William H. Foster, Esq., of counsel for the appellants, and E. C. Aiken, Deputy Attorney General, for the State Industrial Commission, and the Court of Appeals after due deliberation had thereon did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from be affirmed with costs; and further ordered that the record and proceedings be remitted to the Appellate

Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law; and the said remittitur having been filed in this Court,

Now, on motion of Charles D. Newton, Attorney General, attorney for the State Industrial Commission, it is

Ordered that the order and judgment of the Court of Appeals, be and the same is hereby made the order of this Court, and that the award or decision of the State Industrial Commission entered on the 23rd day of May, 1918, be and the same is hereby in all respects affirmed with $99.50 costs to be paid by the appellants.

JOSEPH H. HOLLANDS, *Clerk.*

58 Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim of ELIZABETH VAUGHN, Claimant-Respondent, under the Workmen's Compensation Law

against

CLARK KNITTING CO., INC., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

It is hereby stipulated by and between the attorneys for the respective parties hereto, pursuant to Rule 8 of the Supreme Court of the United States, that the following portions of the record shall constitute the transcript of record on writ of error from the Supreme Court of the United States, and that the Clerk shall transmit to the Clerk of the Supreme Court of the United States only the papers herein designated as follows:

Statement under Rule 41;
Notice of Appeal to Appellate Division;
Employer's first Report of Injury;
Attending Physician's Report;
Employee's Claim for Compensation;
Notice of Award;
Minutes of Hearing at Utica, November 14, 1917;
Notice of Award;
Minutes of Hearing at Syracuse, January 31, 1918;
Notice of Award;
Minutes of Hearing, Syracuse, May 23, 1918;
Notice of Award;
59 Conclusions of Fact, Ruling of Law, Award and Decision;
Affidavit of No Opinion by Commission;
Certification of Record to Appellate Division;
Order Settling Case;
Order of Affirmance by Appellate Division;
Order of the Commission thereon;
Notice of Appeal to Court of Appeals;
Affidavit of No Opinion by Appellate Division;
Certification of Record to Court of Appeals;
Order Settling Case;
Judgment of the Court of Appeals;

Order of Appellate Division entered on Judgment of Court of Appeals.
Dated May 19th, 1919.

WILLIAM H. FOSTER,
Attorney for Appellants.
CHARLES D. NEWTON,
(E. C. A.),
Attorney General of the State of New York, Attorney for Respondent.

60 [Endorsed:] (Original.) Supreme Court, Appellate Division, Third Department. In the Matter of the Claim of Elizabeth Vaughn, Claimant-Respondent, against Clark Knitting Co., Inc., Employer, and Ætna Life Insurance Company, Insurance Carrier, Defendants-Appellants. Stipulation pursuant to Rule 8 of the U. S. Supreme Court. William H. Foster, Attorney for Appellants, Office and Post Office Address, Syracuse, N. Y.

61 Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim of ELIZABETH VAUGHN, Claimant-Respondent, for Compensation under the Workmen's Compensation Law

against

CLARK KNITTING CO., INC., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

STATE OF NEW YORK,
Third Judicial Department, ss:

I, Joseph H. Hollands, Clerk of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York; do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Elizabeth Vaughn, claimant-respondent, against Clark Knitting Co., Inc., employer, and Ætna Life Insurance Company, insurance carrier, defendants-appellants, as set forth in the annexed stipulation bearing date May 19th, 1919, and made pusuant to Rule 8 of the Supreme Court of the United States between the attorneys for the respective parties hereto, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Albany, State of New York, this 19th day of May, 1919.

[Seal Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk of the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York.

62 [Endorsed:] (Original.) Supreme Court, Appellate Division, Third Department. In the Matter of the Claim of Elizabeth Vaughn, Claimant-Respondent, against Clark Knitting Co., Inc., Employer, and Ætna Life Insurance Company, Insurance Carrier, Defendants-Appellants. Authentication of Record. William H. Foster, Attorney for Appellants, Office and Post Office Address, Syracuse, N. Y.

33 Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim of ELIZABETH VAUGHN, Claimant-Respondent, for Compensation under the Workmen's Compensation Law

against

CLARK KNITTING CO., INC., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

In obedience to the commands of the writ of error herein allowed May 14th, 1919, I herewith transmit to the Supreme Court of the United States a duly certified transcript of such portion of the record and proceedings in the above entitled cause as, in pursuance of Rule 8 of the Supreme Court of the United States, the attorneys for the respective parteis hereto have by stipulation designated, with all things concerning the same.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Albany, State of New York, this 19th day of May, 1919.

[Seal Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk of the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York.

64 [Endorsed:] (Original.) Supreme Court, Appellate Division, Third Department. In the Matter of the Claim of Elizabeth Vaughn, Claimant-Respondent, against Clark Knitting Co., Inc., Employer, and Ætna Life Insurance Company, Insurance Carrier, Defendants-Appellants. Return to Writ of Error. William H. Foster, Attorney for Appellants, Office and Post Office Address, Syracuse, N. Y.

65 Supreme Court, Appellate Division, Third Department.

In the Matter of the Claim of ELIZABETH VAUGHN, Claimant-Respondent, for Compensation under the Workmen's Compensation Law

against

CLARK KNITTING CO., INC., Employer, and ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier, Defendants-Appellants.

STATE OF NEW YORK,
Third Judicial Department, ss:

I, Joseph H. Hollands, Clerk of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, do hereby certify that there have been lodged with me, as such Clerk, this day, in the above entitled cause:

1. The original bond, of which a copy is hereto annexed;
2. Two copies of the writ of error as herein set forth, one for the defendant in error above and one to file in my office;
3. One copy of the prayer for reversal, petition and assignment of errors herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Albany, State of New York, this 19th day of May, 1919.

[Seal Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk of the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York.

66 Supreme Court of the United States.

CLARK KNITTING COMPANY, INC., and ÆTNA LIFE INSURANCE COMPANY, Plaintiff'-in-error,

against

ELIZABETH VAUGHN, Defendant-in-error.

Know all men by these presents, that the Ætna Casualty and Surety Company of Hartford, Connecticut, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and having its principal business at Hartford, Connecticut, duly authorized to transact business in the State of New York, and having an office for that purpose in the City of Syracuse, N. Y., is held and firmly bound unto Elizabeth Vaughn in the sum of Five Thousand ($5000.00) Dollars lawful money of the United States, to be paid to said Elizabeth Vaughn, her executors, administrators and

assigns, for which payment well and truly to be made, the said Ætna Casualty and Surety Company of Hartford, Connecticut, binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with the seal of the Ætna Casualty and Surety Company and dated this 29th day of Apr., 1919.

Now, whereas, the above named the Clark Knitting Company, Inc., Employer, and the Ætna Life Insurance Company, Insurance Carrier, are prosecuting a writ of error to the Supreme Court of the United States to reverse the order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York entered on the 29th day of Apr., 1919, whereby a judgment of the Court of Appeals of the State of New York, rendered April 8th, 1919, was made the judgment of said Appellate Division, a reversal of which judgment is likewise sought,

Now, therefore, the condition of this obligation is such that if the above named Clark Knitting Co., Inc., Employer, and Ætna Life Insurance Company, Insurance Carrier, shall prosecute their said writ to effect and, if they fail to make good their plea, shall answer all damages and costs, then this obligation shall be void, otherwise to remain in full force and virtue.

ÆTNA CASUALTY AND SURETY COMPANY OF HARTFORD, CONN.,
By B. E. WATSON,
Resident Vice-President. [L. S.]

Attest:
[L. S.] GEORGE J. KESEL,
Resident Assistant Secretary.

Approved this 14th day of May, 1919, to act as a supersedeas.
LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

67 STATE OF NEW YORK,
County of Onondaga, ss:

On this 29th day of April, 1919, before me personally came B. E. Watson, to me known, who, being by me duly sworn, did depose and say: That he resides in the City of Syracuse, New York; that he is Resident Vice-President of The Ætna Casualty and Surety Company, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Company; that he signed his name thereto by like order; that he is acquainted with George J. Kesel; that he knows him to be the Resident Ass't Secretary of said Company; that the signature of said George J. Kesel, subscribed to said instrument, is in the genuine handwriting of said George J. Kesel, and was thereto subscribed by like order of said

Board of Directors, and in the presence of him, the said B. E. Watson.

FRED I. OLMSTEAD,
Notary Public.

At a regular meeting of the Board of Directors of the Company, duly called and held on the 28th day of December, A. D. 1911, the following By-Law was adopted:

Article 8. Resident Officers, Attorneys-in-Fact, and Agents.

Section 1. The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of the Company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any time remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-Fact or Agent, and revoke the power and authority given him.

Section 2. Resident Vice-Presidents may, subject to the provisions and limits named in their certificate of authority, sign and execute on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the President or any other Officer could bind it; Such bonds and undertakings, however, to be attested in every instance by a duly appointed Resident Assistant Secretary.

Section 3. Resident Assistant Secretaries may, subject to the provisions and limits named in their certificate of authority, affix the seal of the Company to and attest on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the Secretary or any other Officer could bind it; such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed Resident Vice-President.

Section 4. Attorneys-in-Fact may, subject to the provisions and limits named in their certificate of authority, execute and deliver and attach the seal of the Company to any and all bonds and undertakings and other writings obligatory in the nature of a bond on behalf of the Company, and any such instrument executed by any such Attorney-in-Fact when attested by any other Attorney-in-Fact shall be as binding upon the Company as if signed, sealed, and attested by any Officer of the Company.

STATE OF CONNECTICUT,
County of Hartford, ss:

I, D. G. Stone, — of The Ætna Casualty and Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do hereby

certify that the same is a true and correct transcript therefrom, and of the whole of said original By-Law.

Given under my hand and the seal of the Company, at Hartford, Conn., this 23rd day of September 1918.

[Seal the Ætna Casualty and Surety Company, Hartford, Conn.]

D. G. STONE, *Secretary.*

68 The Ætna Casualty and Surety Company, Hartford, Connecticut.

ÆTNA.

Certificate of Authority of Resident Assistant Secretary.

Know all men by these presents that George J. Kesel has been and is hereby appointed Resident Assistant Secretary of The Ætna Casualty and Surety Company, of Hartford, Connecticut, at Syracuse, New York, and as such Resident Assistant Secretary has power and authority to affix the seal of the Company to, and attest on behalf of the Company, any and all bonds and undertakings, and all bonds and undertakings sealed and attested by him, when signed by a duly appointed Resident Vice-President, shall be as valid and binding upon the Company as if said bonds and undertakings had been sealed and attested by the Secretary.

This appointment is made under and by authority of the following By-Law adopted by the Board of Directors of the Company at a meeting duly called and held on the 28th day of December, 1911.

Article 8. Resident Officers, Attorneys-in-fact, and Agents.

Section 1. The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-fact and Agents to represent and act for and on behalf of the company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any time remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-Fact or Agent and revoke the power and authority given him.

Section 3. Resident Assistant Secretaries may, subject to the provisions and limits named in their certificate of authority, affix the seal of the Company to and attest on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the Secretary or any other Officer could bind it; such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed Resident Vice-President.

In witness whereof, the Ætna Casualty and Surety Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, this 15th day of May, A. D. 1919.

THE ÆTNA CASUALTY AND SURETY COMPANY,
By D. N. GAGE, *Secretary.*

STATE OF CONNECTICUT,
County of Hartford, ss:

On this 15th day of May, A. D. 1919, before me personally came D. N. Page, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Hartford, State of Connecticut; that he is the Secretary of the Ætna Casualty and Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

JAMES F. McEVITT,
Notary Public.

My Commission Expires Jan. 31, 191–.

69 The Ætna Casualty and Surety Company, Hartford, Connecticut.

ÆTNA.

Certificate of Authority of Resident Assistant Secretary.

Know all men by these presents that B. E. Watson has been and is hereby appointed Resident Assistant Secretary of The Ætna Casualty and Surety Company, of Hartford, Connecticut, at Syracuse, New York, and as such Resident Assistant Secretary has power and authority to affix the seal of the Company to, and attest on behalf of the Company, any and all bonds and undertakings, and all bonds and undertakings sealed and attested by him, when signed by a duly appointed Resident Vice-President, shall be as valid and binding upon the Company as if said bonds and undertakings had been sealed and attested by the Secretary.

This appointment is made under and by authority of the following By-Law adopted by the Board of Directors of the Company at a meeting duly called and held on the 28th day of December, 1911.

Article 8. Resident Officers, Attorneys-in-fact, and Agents.

Section 1. The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-fact and Agents to represent and act for and on behalf of the company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any

time remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-Fact or Agent and revoke the power and authority given him.

Section 3. Resident Assistant Secretaries may, subject to the provisions and limits named in their certificate of authority, affix the seal of the Company to and attest on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the Secretary or any other Officer could bind it; such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed Resident Vice-President.

In witness whereof, the Ætna Casualty and Surety Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, this 26th day of April, A. D. 1919.

THE ÆTNA CASUALTY AND SURETY COMPANY,
By NORMAN C. STEVENS, *Secretary.*

STATE OF CONNECTICUT,
County of Hartford, ss:

On this 26th day of April, A. D. 1919, before me personally came Norman C. Stevens, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Hartford, State of Connecticut; that he is the Secretary of the Ætna Casualty and Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

E. MATHER,
Notary Public.

My Commission Expires Jan. 31, 191-.

70 The Ætna Casualty & Surety Company of Hartford, Connecticut.

Financial Statement as of December 31, 1918.

Assets.

Mortgage Loans	$1,442,100.00
Collateral Loans	605,815.05
Stocks & Bonds	6,591,985.15
Unpaid Premiums Subsequent to October 1, 1918	1,498,223.70
Unpaid Premiums prior to October 1, 1918	84,603.31
Cash in Office & Banks	2,094,271.96
Accrued Interest	131,330.82
All other Assets	290,250.84
Total Assets	12,738,580.83

Deduct Assets not Allowed by Insurance Departments viz.:		
Unpaid Premiums prior to October 1, 1918	84,603.31	
Other Assets	171,826.01	
		256,429.32
Admitted Assets on basis allowed by Insurance Departments		12,482,151.51

Liabilities.

Premium Reserve		$3,496,180.54
Claim Reserve		2,097,002.49
Reserve for Accrued Taxes		368,347.62
Reserve for other Liabilities		368,353.84
Reinsurance in other Cos.		11,559.95
Total Liabilities except Capital		7,241,444.44
Surplus	3,497,136.39	
Less Assets not allowed by Insurance Departments	256,429.32	
Surplus on basis allowed by Insurance Departments	3,240,707.07	
Capital Stock	2,000,000.00	
		5,240,707.07
Total		12,482,151.51

STATE OF CONNECTICUT,
County of Hartford, ss:

C. H. Remington, being duly sworn, says: that he is Assistant Treasurer of The Ætna Casualty and Surety Company and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said Company as of December 31, 1918.

C. H. REMINGTON,
Assistant Treasurer.

Subscribed and sworn to before me this 8th day of April, 1919.

[Seal E. A. Giddings, Notary Public, Hartford, Conn.]

E. A. GIDDINGS,
Notary Public.

My Commission expires Feb. 1, 1923.

71 [Endorsed:] (Original.) Supreme Court, Appellate Division, Third Department. In the Matter of the Claim of Elizabeth Vaughn, Claimant-Respondent, against Clark Knitting Co., Inc., Employer, and Ætna Life Insurance Company, Insurance Carrier, Defendants-Appellants. Certificate of Lodgment. William H. Foster, Attorney for Appellants, Office and Post Office Address, Syracuse, N. Y.

72 Supreme Court of the United States.

CLARK KNITTING COMPANY, INC., and ÆTNA LIFE INSURANCE COMPANY, Plaintiffs-in-Error,

against

ELIZABETH VAUGHN, Defendant-in-Error.

Prayer for Reversal.

To the Supreme Court of the United States:

Come now Clark Knitting Co., Inc., Employer, and Ætna Life Insurance Co., Insurance Carrier, plaintiffs-in-error, and pray for a reversal of the order of the Supreme Court of the State of New York herein entered in the office of the clerk of the Appellate Division thereof, in the Third Judicial Department in said state, on the 6th day of May, 1919, affirming a decision and award of the State Industrial Commission of said state, a reversal of which is likewise prayed, entered on the 12th day of June, 1918, and plaintiffs-in-error further pray for a reversal of the judgment of the Court of Appeals of said state, rendered on the 8th day of April 1919, upon which said order hereinbefore first mentioned was entered.

And your petitioners will every pray.

Dated May 9th, 1919.

ROBERT E. WHALEN,
Of Counsel for Clark Knitting Co., Inc., Employer, and Ætna Life Insurance Company, Insurance Carrier.

73 Supreme Court of the United States.

CLARK KNITTING COMPANY, INC., and ÆTNA LIFE INSURANCE COMPANY, Plaintiffs-in-Error,

against

ELIZABETH VAUGHN, Defendant-in-Error.

Petition for Writ of Error.

To the Supreme Court of the United States and to the Honorable Justices thereof:

The petition of the Clark Knitting Co., Inc., Employer, a corporation organized and incorporated under the laws of the State of New

York, and the Ætna Life Insurance Company, Insurance Carrier, an insurance corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Connecticut and having been duly authorized to transact the business of insurance in the State of New York as an insurance corporation respectfully shows:

First. On or about the 10th day of April 1917, the above named, Elizabeth Vaughn, commenced before the State Industrial Commission of the State of New York, a special proceeding against your petitioners and therein alleged:

(*a.*) That said Elizabeth Vaughn at about 7.10 A. M. on April 9, 1917, while employed as assistant forelady at the plant of her employrer, was helping a girl in the factory locate a screw from a machine, and that while on the floor, the electricity drew her hair into a shaft removing her scalp.

(*b.*) That as a result of her injury received on April 9, 1917, the said Elizabeth Vaughn, has been disabled from working ever since April 9th, for which loss of earning power she claimed, in accordance with the provisions of Chapter 41 of the Laws of 1914 of the State of New York, commonly known as the Workmen's Compensation Law, compensation which said State Industrial Commission has awarded to Elizabeth Vaughn in the sum of $7.69 weekly to be continued during the disability suffered by the claimant which
74 your petitioners have paid.

(*c.*) That by reason of her said injury as aforesaid, said Elizabeth Vaughn had also sustained "serious facial and head disfigurement" for which she claimed a further allowance which said State Industrial Commission made to her in the sum of $3500.00 by virtue of the amendment made by Chapter 622 of the laws of 1916 of the State of New York, to Subdivision 3 of Section 15 of said Workmen's Compensation Law, whereby "In case of any injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award of compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars."

Second. In said proceeding before the State Industrial Commission your petitioners appeared and contended that to make to said Elizabeth Vaughn any award for facial or head disfigurement under the provisions of said amendment to Subdivision 3 of Sec-ion 15 of said Workmen's Compensation Law would be tantamount to making an award not for loss of earning power, but for damages, and would, therefore, deprive your petitioners of their property without due process of law, in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Third. The written decision and award which said State Industrial Commission, after hearing the allegations and proofs of the parties, entered on the 12th day of June 1918, overruled the contention of your petitioners specified in Paragraph Second of *of* this pe-ition, but contained no finding that said facial and head disfigurement had in any wise impaired the earning capacity of said Elizabeth Vaughn to whom said decision and award decreed that your

petitioners pay $7.69 weekly to be continued during disability suffered by claimant and for said facial and head disfigurement, the said further sum of $3500.

Fourth. From said decision and award of said State Industrial Commission your petitioners duly appealed to the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York, where, upon the argument of said appeal which duly came on to be heard, your petitioners, through their counsel, duly urged against the validity of said award of $3500 for said facial and head disfigurement, the contention hereinbefore specified in paragraph Second of this petition, but said Appellate Division of the Supreme Court overruled said contention and, by an order bearing date November 12th, 1918, and entered in the office of the clerk of said Appellate Division on the 19th day of November, 1918, said Appellate Division wholly affirmed said decision and award of said Commission so entered on the 12th day of June, 1918.

75

Fifth. From said order of said Appellate Division, your petitioners duly appealed to the Court of Appeals of the State of New York, which was and is the highest court of said state in which could be had a decision of the question so raised by said contention of your petitioners hereinbefore specified in paragraph second of this petition, and which contention your petitioners, through their counsel, duly urged upon the argument of said appeal to the Court of Appeals of the State of New York which duly came on to be heard. But said Court of Appeals overruled said contention of your petitioners, and, by its judgment rendered April 8th, 1919, said Court of Appeals affirmed said order of said Appellate Division of the Supreme Court, to which said Court of Appeals sent down its remittitur, consisting of a copy of said judgment of said Court of Appeals and of the papers upon which said Court of Appeals made its said judgment, and said remittitur was filed on the 9th day of April, 1919, in the office of the clerk of said Appellate Division where said remittitur now remains of record. Upon said remittitur a final order, reexamination and reversal of which by this court your petitioners seek, was entered on the 6th day of May, 1919, in the office of the clerk of said Appellate Division whereby the said judgment of the court of Appeals herein became the order of said Appellate Division, and the sum of $99.50, costs of said appeal to said Court of Appeals was awarded against your petitioners.

76

Sixth. In said judgment of the Court of Appeals as well as in said final order thereon so entered on the 6th day of May, 1919 in the office of the clerk of said Appel-ate Division, there was drawn in question the validity of a statute of the State of New York, to wit, said amendment made by said Chapter 622 of the Laws of 1916 to Subdivision 3 of 15 of said Workmen's Compensation Law, upon the ground of the repugnancy of said statute to the due process clause of the Fourteenth Amendment to the Constitution of the United States, but the decision was in favor of the validity of such statute.

Seventh. By virtue of the provisions of said Workmen's Compensation Law, said State Industrial Commission which is now composed

of John Mitchell, Edward P. Lyon, James M. Lynch, Henry D. Sayer and Frances E. Perkins, appeared by the Attorney General of the State of New York both in said Appellate Division and in said Court of Appeals, in support of the validity of said statute thus brought up for review by said appeals.

Wherefore your petitioners pray that a writ of error may be allowed and issued, directed to the Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York, commanding said Appellate Division to send to the Supreme Court of the United States the record of all and singular the record and papers in said special proceeding and for citation and supersedeas to stay execution, and to the end that the errors of which your petitioners complain herein and in the assignment of errors herein filed may be reviewed and, if errors be found, corrected conformably to the Constitution and Laws of the United States.

77 And your petitioners will ever pray.

Dated, May 9th, 1919.

CLARK KNITTING COMPANY,
Employer, and
ÆTNA LIFE INSURANCE CO.,
Insurance Carrier,
By ROBERT E. WHALEN, *Counsel.*

78 STATE OF NEW YORK,
City and County of Albany, ss:

Robert E. Whalen being duly sworn deposes and says that he is the regularly retained counsel for the petitioners Clerk Knitting Co., Inc., Employer, and Ætna Life Insurance Company, Insurance Carrier, in this proceeding. That he has read the foregoing petition, the contents whereof he knows to be true.

That the reason why this verification is made by deponent is that said petitioners are corporations none of whose officers reside or are within the County of Albany, State of New York, where deponent resides and has his place of business.

ROBERT E. WHALEN.

Subscribed and sworn to before me this 9th day of May, 1919.

[Seal Edith L. Jones, Notary Public, Albany County, N. Y.]

EDITH L. JONES,
Notary Public, Albany County, N. Y.

79 Supreme Court of the United States.

CLARK KNITTING COMPANY, INC., and ÆTNA LIFE INSURANCE COMPANY, Plaintiffs-in-Error,

against

ELIZABETH VAUGHN, Defendant-in-Error

Assignment of Errors.

Come now the Clark Knitting Co., Inc., Employer, and Ætna Life Insurance Company, Insurance Carrier, plaintiffs-in-error, and make and file this their assignment of errors:

The Appellate Division of the Supreme Court, in and for the Third Judicial Department of the State of New York in its order entered May 6th, 1919 whereby the judgment of the Court of Appeals of the State of New York rendered April 8th, 1919, was made the judgment of said Appellate Division, erred, as did also said Court of Appeals and the State Industrial Commission of the State of New York, in overruling the *the* contention of your petitioners that to make the said Elizabeth Vaughn, an award in this proceeding for facial and head disfigurement under the amendment made by Chapter 622 of the Laws of 1916 of the State of New York to Subdivision 3 of Section 15 of the Workmen's Compensation Law of said state, would deprive your petitioners of their property without due process of law in contravention of the Fourteenth amendment to the Constitution of the United States.

Dated, May 9th, 1919.

ROBERT E. WHALEN,
Of Counsel for the Clark Knitting Co., Inc., Employer, and Ætna Life Insurance Co., Insurance Carrier.

80 [Endorsed:] Supreme Court of the United States. Clark Knitting Co., Inc., Employer, and Ætna Life Insurance Co., Insurance Carrier Plaintiffs-in-error, against Elizabeth Vaughn Defendant-in-error. Prayer for Reversal, Petition for Writ of Error, and Assignment of Errors. Robert E. Whalen, Counsel for Plaintiffs-in-Error. Office and Post Office Address, 126 State Street, Albany, N. Y.

81 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court, Appellate Division in and for the Third Judicial Department of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, Appellate

Division, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Clark Knitting Company, Inc., and Ætna Life Insurance Company, and Elizabeth Vaughn, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the
82 United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Clark Knitting Company, and Ætna Life Insurance Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourteenth day of May, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States, October Term, 1918. Clark Knitting Company, Inc., and Ætna Life Insurance Company, Pl'ffs in Error, vs. Elizabeth Vaughn. Writ of Error.

83 UNITED STATES OF AMERICA, *ss:*

To Elizabeth Vaughn, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court, Appellate Division, in and for the Third Judicial Department of the State of New York, wherein Clark Knitting Company, Inc., and Ætna Life Insurance Company are

plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, this fourteenth day of May, in the year of our Lord one thousand nine hundred and nineteen.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

Due and personal Service of a copy of the within Citation is hereby admitted this 16th day of May, 1919.

CHARLES D. NEWTON,
(E. C. A.),
Attorney General of the State of New York.

Endorsed on cover: File No. 27127. New York Supreme Court, Appellate Division, 3d Judicial Department. Term No. 1041. Clark Knitting Company, Inc., and Ætna Life Insurance Company, plaintiffs in error, vs. Elizabeth Vaughn. Filed May 21st, 1919. File No. 27127.

BRIEF FOR PLAINTIFFS-IN-ERROR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 376.

CLARK KNITTING CO., INC., AND ÆTNA LIFE INSURANCE COMPANY,
Plaintiffs-in-Error,

vs.

ELIZABETH VAUGHN,
Defendant-in-Error.

In Error to the Supreme Court, Appellate Division, Third Judicial Department of the State of New York.

Statement of the Case.

This case involves (Transcript p. 47), the constitutionality under the due process clause of the 14th amendment to the Constitution of the United States, of the disfigurement clause which, added by Chapter 622 of the Laws of 1916 of the State of New York to Subdivision 3 of Section 15 of New York Wodrkmen's Compensation Law, provides "that in case of an injury resulting in serious facial or head disfigurement the Commission may, in its discretion, make such award of compensation as it may deem

proper and equitable in view of the nature of the disfigurement not to exceed $3500."

So much of the New York Workmen's Compensation Law thus amended as is deemed necessary to the decision of this cause is annexed to the brief in the New York Central Railroad Co. vs. Bianc, as Appendix A, page 17, which is No. 374 upon the docket of the present term of this court.

Section 19 added to Article 1 of the Constitution of the State of New York in 1913 effective January 1, 1914, is annexed to the brief of the New York Central Railroad Co. vs. Bianc, as Appendix B thereof, which is No. 374 upon the docket of the present term of this court. It is also printed in full 243 U. S. at Pages 195, 196.

This proceeding was commenced by filing with the State Industrial Commission Employer's First Report of Injury dated April 10, 191—. A claim was filed with the State Industrial Commission by the claimant which bears the date July 25, 1917. This claim alleges that upon the 9th day of April, that while helping a girl in the factory locate a screw from the machinery, and while on the floor the electricity drew her hair into a shaft removing the scalp. (Transcript pp. 3 and 5.)

The case came on for a hearing on the 23rd day of May, 1918, before Commissioner James M. Lynch of the State Industrial Commission, and at that hearing the following objections were made to an award herein. (Transcript p. 23.)

1. "I object to the making of any award on the ground that the amendment to Subdivision 3 of Section 15 of Chapter 622 of the Laws of 1916, pro-

viding for serious facial disfigurement is unconstitutional in that it assesses damages without the right of a trial by jury in addition to providing compensation for disability.

2nd. It is unconstitutional in that it is contrary to the Constitution of the United States and to the Consitution of the State of New York in that it takes property without due process of law.

3rd. The Compensation Law of the State of New York being a compulsory act, compensation cannot be awarded for disability and additional compensation for damages for disfigurement in violation of the Constitution of the United States and the Constitution of the State of New York.

4th. Chapter 622 of the Laws of 1916 added to Section 15, Subdivision 3 of the Workmen's Compensation Law of the State of New York is unconstitutional and void."

The Commission, however, overruled the objections and on the same day made its decision and award, (Transcript pp. 25-26.) As the statute designates the determination of the Commission, whereby in addition to continuing the claim for further hearing to determine the extent of disability resulting from the accident it stated that an award of compensation is hereby made against the Clark Knitting Company, Inc., Employer, and Ætna Life Insurance Company, Insurance Carrier, to Elizabeth Vaughn, injured employee in the sum of $3500.00 on account of and in view of the serious facial and head disfigurement resulting from injuries sustained on April 9, 1917." The Appellate Division of the Supreme Court in the Third Judicial Department,

unanimosuly and without opinion affirmed the decision and award of the Commission. (Transcript pp. 27-28-30.) On further appeal taken to the Court of Appeals, the Appellate Division's order of affirmance was in turn affirmed. (226 N. Y. 585) on the authority of matter of Sweeting vs. American Knife Company (226 N. Y. 199) decided on the same day. (Transcript P. 31.) The opinions in the Court of Appeals are also printed at pp. 30-33 of the transcript of the record in the Sweeting case, which is No. 375 upon the docket of the present term of this court.

The Court of Appeals sent down its remittitur to the Appellate Division to which the writ of error to this court is directed. (Transcript pp. 32, 47.)

Specification of Error.

Plaintiffs-in-Error contend that the Court of Appeals as also the Appellate Division and the State Industrial Commission erred in not holding that to make the defendant-in-error an award for facial and head disfigurement under the provisions of Section 15 of the Workmen's Compensation Law would deprive the plaintiffs-in-error of their property without due process of law in contravention of the provisions of the 14th amendment to the Federal Constitution.

Argument.

Statement of Facts.

On April 9, 1917, at 7:10 A. M., claimant herein was employed by the Clark Knitting Co., Inc., as a neck cutter in the finishing department. It seems that the operator of the tacking machine lost the

screw out of her needle bar and claimant came along and asked her what she was looking for and volunteered to help find it. Claimant discovered it on the floor on the opposite side of the sewing machine table, got down on the floor and reached under the shaft and her hair caught in the revolving shaft and removed the scalp from her forehead to base of scalp. By reason of which she suffered evulsion of the scalp from the hair line over the frontal area to the 7th vertebrae behind, ears were torn down and cartilages severed, losing the entire scalp and necessitating a suitable wig. (Transcript pp. 3, 4 and 5.) For this facial and head disfigurement the Commission awarded her $3500. (Transcript pp. 23 and 25.) The decision of the Commission does not specify the nature of the disfigurement, but simply says the injuries received by Eliz. Vaughn on said date also resulted in serious facial or head disfigurement. (Transcript p. 25.)

There is nothing in the record to show that claimant's inability to work or inability to earn wages is due to the disfigurement. While it is true that claimant alleges that she has been unable to work since the accident, it has been due to her physical condition rather than to her disfigurement. (Transcript 25.) No negligence or want of care on the part of the employer has been alleged or found.

POINTS.

For a discussion of the points in this case, the court is respectfully referred to the brief in the case of Sweeting vs. American Knife Co., which is No. 375 upon the docket of the present term of this court which is to be argued herewith.

The award for disfigurement should be reversed and this case should be remanded for further proceedings not inconsistent with the decision of this court.

All of which is respectfully submitted.

Dated October 13, 1918.

WILLIAM H. FOSTER,
Of Counsel for Plaintiff-in-Error.

Office Supreme Court, U. S.
FILED
OCT 10 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 376.

CLARK KNITTING CO., INC., Employer, and AETNA LIFE INSURANCE COMPANY, Insurance Carrier,
Plaintiffs in error,

against

ELIZABETH VAUGHN,
Defendant in error.

IN ERROR TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD DEPARTMENT.

CHARLES D. NEWTON,
Attorney-General.

E. C. AIKEN,
Deputy Attorney-General.

Of Counsel for the State Industrial Commission.

Brief for the State Industrial Commission

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. 376.

CLARK KNITTING CO., *Employer* and AETNA LIFE INSURANCE COMPANY, Insurance Carrier, *Plaintiffs-in-Error,*

against

ELIZABETH VAUGHN, *Defendant-in-Error.*

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK.

STATEMENT OF CASE

This is a writ of error to review a judgment of the Court of Appeals of the State of New York, which affirmed an order of the Appellate Division, Third Department, which unanimously affirmed an award of the State Industrial Commission made to the claimant in the sum of $3,500 for facial and head disfigurement, and the claim con-

tinued for further hearing to determine the extent of disability resulting from said accident. (Fol. 43.)

The business of the employer was that of manufacturing knit underwear. (Fol. 3.) The claimant was a neck cutter in the finishing department. (Fol. 4.) She was forty-six years of age. (Fol. 17.) At the time of the accident a screw had been lost out of the needle bar of a tacking machine and the claimant discovered it on the floor on the opposite side of the sewing machine table and she got down on the floor and reached under the shaft and her hair caught in the revolving shaft and removed the scalp from the forehead to the base of the skull. (Fol. 15.) There was complete avulsion of the scalp from the hair line over the frontal area to the seventh vertebra behind. The ears were torn down and the cartilages severed resulting in the loss of the whole scalp. (Fol. 7.)

At the time of the accident an effort was made to control the hemorrhage and revive her. She finally rallied from the shock and skin grafting was commenced under anesthesia, small patches being done once in two, three or four weeks according to her condition. (Fol. 20.) Her condition was very grave all through the early weeks. Skin was grafted upon her head seven or eight times and each time fifty to one hundred individual grafts were put on. These grafts had to be the full thickness of the skin — an ordinary graft would not do. It was necessary to take the skin down to the fat to make a scalp that would stand the least bit of pressure. (Fols. 20, 33.) In all there were over five hundred and twenty-five grafts. (Fol. 21.) The skin which was grafted

was removed from the thighs. The removal of such a large quantity of skin affected the general system as it lessened the amount of skin surface and so affected the action of the kidneys. (Fol. 23.) This gave the claimant a more or less chronic Bright's Disease, which together with the action of the anesthetic also affected her heart. (Fols. 20, 23.)

The result of her injury and the treatment which she received following the injury resulted not only in diseased kidneys but in a very nervous condition. Claimant cannot walk very far nor stoop over to do her housework. Her face has become very dark — previous to the accident she had a fair complexion (fols. 16, 32.) Her eyesight is somewhat affected, the eyebrow over the left eye having been drawn up (fol. 17) so that she is to all practical purposes permanently disabled. (Fol. 21.)

The insurance carrier paid compensation for disability until about the 6th of May (fol. 36), and at the hearing on June 12th an award was made of $3.500 for facial disfigurement. (Fol. 39.) The question which the insurance carrier now makes is that the amendment to the law allowing for serious facial disfigurement is unconstitutional. (Fol. 38.)

ARGUMENT

POINT I

No valid Constitutional objection has been raised and the award for facial disfigurement was properly made.

The Workmen's Compensation Law of New York was thoroughly discussed before this court on argument and reargument, and considered in the case of *New York Central R. R. Company* v. *White*, 243 U. S. 188, and a very exhaustive opinion written by Mr. Justice Pitney and concurred in by the entire court.

The gist of that opinion was that the common law gave the workman compensation for damages when the employer was at fault. That that remedy was taken away and a remedy given for damages received, irrespective of fault; that the Legislature had the right to place such a burden upon the employer, providing the same was reasonable.

Since the decision of that case this court has on two occasions had to deal with Workmen's Compensation Laws of other states. In the case of *Middleton* v. *Texas Power & Light Company*, this court had the question raised by the employe that the Texas Employers Liability Act was in conflict with the due process and equal protection provisions of the Fourteenth Amendment. The court, through Mr. Justice Pitney, stated in reference to the compensation allowed under said statute:

> "Such compensation is the statutory substitute for damages otherwise recoverable because of injuries suffered by an employe, or his death occasioned by such injuries, when due to the negligence of the employer or his servants; it being declared that the employe of a subscribing employer, or his representatives or beneficiaries in case of his death, shall have no cause of action against the employer for damages except where a death is caused by the wilful act or omission or gross negligence of the employer."

Again in the case of *Arizona Copper Company* v. *Hammer,* this court had under consideration the Employers Liability Law and the Workmen's Compulsory Compensation Law of Arizona. The Employers' Liability Law of Arizona designated certain employments as inherently hazardous and dangerous to workmen, and imposed upon the employer, without regard to the question of fault, liability and compensatory damages for accidental personal injuries or death of an employee arising out of and in the course of the employment and due to the condition or conditions of the occupation, in cases where such injury of the employe shall not have been caused by his own negligence.

Regarding this law, the court, through Mr. Justice Pitney says:

> "We are unable to say that the Employers' Liability Law of Arizona, in requiring the employer in hazardous industries to assume — so far as pecuniary consequences go — the entire risk of injury to the employee attributable to accidents arising in the course of the employment, and due to its inherent

conditions, exceeds the bounds of permissible legislation, or interferes with the constitutional rights of the employer."

It is further stated:

"It is objected that the responsibility of the employer under this statute is unlimited; but this is not true except as it is true of every action for compensatory damages where the amount awarded varies in accordance with the nature and extent of the damages for which compensation is made. It is said that in actions by employees against employers juries are prone to render extravagant verdicts. The same thing has been said, and with equal reason, concerning actions brought by individuals against railroad companies, traction companies, and other corporations."

And further:

"The statute says to the employer, in effect: 'You shall not employ your fellowmen in a hazardous occupation for gain, you being in a position to reap a reward in money through selling the produce of their toil, unless you come under an obligation to make appropriate compensation in money in case of their death or injury due to the conditions of the occupation.' The rule being based upon reasonable grounds affecting the public interest, being established in advance, and applicable to all alike under similar circumstances, there is, in our opinion, no infringement of the fundamental rights protected by the 14th Amendment.

"Some expressions contained in our opinion in the *White Case* (243 U. S. 203–205) are treated in argument as if they were equivalent to saying that if a state, making a legis-

lative adjustment of employers' liability, departs from the common-law system of basing responsibility upon fault, it must confine itself to a limited compensation, measured and ascertained according to the methods adopted in the compensation acts of the present day. Of course nothing of the kind was intended. In a previous part of the opinion (pp. 196–200) it had been shown that the employer had no constitutional right to continued immuity from liability in the absence of negligence, nor to have the fellow-servant rule and the rules respecting contributory negligence and assumption of risk remain unchanged. The statutory plan of compensation for injured workmen and the dependents of those fatally injured — an additional feature at variance with the common law — was then upheld; but, of course, without saying that no other would be constitutional. For if, as we held in that case, the novel statutory scheme of awarding compensation according to a prearranged scale is sustainable, it follows, perhaps *a fortiori* that the Arizona method of ascertaining the compensation according to the facts of each particular case — substantially the common-law method — is free from objection on constitutional grounds. Indeed, if a state recognizes or establishes a right of action for compensation to injured workmen upon grounds not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law, or according to some prescribed scale reasonably adapted to produce a fair result, is for the state itself to determine. Where the compensation should be paid in a single sum after judgment recovered, as is required by the Arizona Employers' Liability Law just as under the common-law system in the case of a judgment

> based upon negligence, or whether it would be more prudent to distribute the award by instalment payments covering the period of disability or of need, likewise is for the state to determine, and upon this the plaintiffs in error can raise no constitutional question."

And Mr. Justice Holmes, in his concurring opinion also says:

> "But if it is thought to be public policy to put certain voluntary conduct at the peril of those pursuing it, whether in the interest of safety or upon economic or other grounds, I know of nothing to hinder. A man employs a servant at the peril of what that servant may do in the course of his employment, and there is nothing in the Constitution to limit the principle to that instance."

The argument of the plaintiff-in-error to the effect that an award for disfigurement deprives the employer of his property without due process of law should be turned about. If the employer's argument is sound, the employee is the one that is deprived of property without due process of law and not the employer. The employer contends, of course, that the Workmen's Compensation Law is constitutional and that it is intended to and does take the place exclusively of the remedy for negligence formerly existing against the railroad company for injuries received by its employees. (See *Shanahan* v. *Monarch Engineering Co.*, 219 N. Y. 469). Supposing, however, an employee receives an injury which does not disable him from working but removes say all the hair from his head or smashes his nose or cuts off his ears. If the employee sues the employer for this and it is a case where there is

negligence, the employer will reply that there is no remedy against the employee for the reason that the Workmen's Compensation Law is exclusive. The employee then petitions for compensation under the Workmen's Compensation Law and is met by the argument that the employer's property is taken without due process of law as there is no diminution of earning power. The employee, therefore, is deprived of any remedy against his employer for an actionable injury. It cannot be that the reasoning of Mr. Justice Pitney in the White case can be twisted into any such conclusion.

The argument of the appellant that facial disfigurement is wholly unrelated to ability to work will not bear the test of common experience. It is common knowledge and observation that an employer is influenced by a man's personal appearance and that serious damage to the face will continue to be a detriment to a man or woman's ability to earn during his or her entire life. It may be conceded that facial disfigurement is a special and unique form of disability; that it may not disable a man from actual manual labor as is the case with some other accidents. It is on account of this special consideration that the law has taken such cases out of the usual category of disabling accidents where award is made by the week for the disability suffered. Therefore, the general purpose of the law is for a weekly compensation, but the special feature of facial disfigurement is merely an exception as to the manner of payment for disability while the general considerations for the substitution of a theory of compensation for actions for negligence still obtain.

Awards for facial disfigurement, however, are in general accord with other parts of this law. The law provides for a definite amount for permanent partial disability, for the loss of any fingers or of any toes, for the loss of a leg, hand and arm, or an eye. All these are losses of portions of the body and similar to the loss of a nose or an ear. A man may lose one toe or several toes, without impairing his earning capacity. The loss of an eye is a loss of a part of the face. Of course, the loss of an eye is much more apt to interfere with a man's earning power than the loss of an ear or possibly a nose, but it is only a matter of degree.

The argument of plaintiff-in-error proceeds upon the assumption that disfigurement has no relation to earning capacity. He further assumes that:

> "Reparation for diminution or destruction of earning power being, then, the basis of constitutional sanction for compulsory payment of compensation, in the absence of fault on an employer's part, the award for disfigurement, under review herein, cannot stand."

By implication he assumes also, that in this or other cases of facial disfigurement, proof might be made of diminution of earning power on account of facial disfigurement.

It is not for this court to pass upon any such question of fact. The question here is as to the law itself — does it invade the constitutional rights?

Judge Cardozo says in the opinion in this case:

> "One cannot defeat a statute by a presumption that in its enactment the truths of

> life have been ignored. The presumption is, on the contrary, that they have been perceived and heeded. But one of the truths of life is that serious facial disfigurement has a tendency to impair the earning power of its victims. In some callings it would rule out altogether an applicant for employment. In most it would put him at a disadvantage when placed in competition with others."

In the case of *Ball* v. *William Hunt & Sons, Ltd.*, 5 B. W. C. C. 459, the House of Lords had before it the case of a workman who was blind in one eye, but was to all appearances two-eyed. As the result of a new accident the blind eye had to be removed and he could no longer conceal his infirmity. He was then quite unable to obtain work through either his old employers or from anywhere else. The House of Lords held that incapacity for work includes inability to get work, and that the man was entitled to compensation for the disfigurement.

All the features of the Compensation Law of New York were before this court upon the first argument and upon the reargument of the White case. The amendment in question had been adopted and was a part of the law at that time, being an amendment to subdivision 3 of section 15, added by Chapter 22, Laws of 1916, as follows:

> " In case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars."

Counsel for the plaintiff-in-error contends (page 10), that due process of law contemplates

that damages shall be fixed and awarded, if at all, by a jury and not by a court. The amendment to the Constitution of the State of New York, however, provides "for the adjustment, determination and settlement with or without trial by jury of issue which may arise under such legislation."

It is recognized by a long list of decisions that the first ten amendments to the United States Constitution are not operative on the states:

Baron v. *Baltimore*, 7 Pet. 243.
Spies v. *Illinois*, 123 U. S. 131.
Barrington v. *Missouri*, 205 U. S. 483.
Twining v. *New Jersey*, 211 U. S. 93.

THE FACE

Counsel for plaintiff-in-error has spoken of the disfigurement provision of the law as the *beauty clause*, as if it were of minor importance — a thing of shreds and patches — implying that it did not much matter if a man should lose his face, provided his earning ability were not diminished. We have only to obtain the Chinese viewpoint to see that to lose one's face is the direst of calamities.

The soldier in the great war was more concerned over injury to the face than any other part of his body.

To woman the face is her dearest possession. Powder and rouge and paste, and divers other artifices are used to preserve it. The beauty of the paintings of the old masters is centered in the face. A half a million dollars would not purchase the Madonna di San Sisto of Raphael or the Mona Lisa of Leonardo da Vinci.

The face stamps the individual so that he may be recognized. As no two faces, so no two souls are absolutely alike. An unnumbered series of individual faces are formed after the same general type, without making any one the exact counterpart of the other.

Helen of Troy formed the motif of Homer's Iliad. As Marlowe says:

" Is this the face that launched a thousand ships
And burned the topless towers of Ilium?"

The face is the expression of the mind. It is that physical portion of us that distinguishes us from the brutes.

" See what a grace was seated on this brow
Hyperion's curls; the front of Jove himself;
An eye like Mars, to threaten and command;
A station like the herald Mercury
New-lighted on a heaven-kissing hill,—
A combination and a form indeed
Where every god did seem to set his seal
To give the world assurance of a man."

In the face are contained four senses which are the sources of pleasurable delight.

" Oh what a noble gift of heaven is the light of the eye," says Schiller.

With the ear we hear oftentimes " the still, sad music of humanity."

With the nose we may inhale all the perfumes of Araby. Properly formed it fits in with the scheme of personal beauty.

Cyrano de Bergerac's nose made it impossible for him to try to win the love of Roxane.

Then to some come the pleasure of taste, the delights of eating and drinking. Even the poet Keats is said to have put pepper on his tongue

that he might enjoy to a more superlative degree the coolness of the claret which he drank.

The sense of touch reaches consummation in the face, whether it be the passionate kiss of love, the chaste kiss of friendship or the Judas kiss of treachery.

The history of the world might be written in faces,— the snub nose of Socrates — the warty face of Cromwell — the majestic head of Washington — the strong, sad features of Lincoln.

Then there are the faces of women who have troubled the peace of the world — Helen of Troy and Cleopatra, Beatrice Cenci and Beatrice d'Este, Lady Hamilton and Aspasia, Queen Elizabeth, the virgin but virile Queen of England, and Joan of Arc, the martyred Maid of France.

We all look forward to see the faces of these men and women of history, as well as those of personal friends, for

"With the morn those angel faces smile
Which I have loved long since and lost awhile."

POINT II

THE ORDER OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, AFFIRMING THE AWARD OF THE WORKMEN'S COMPENSATION COMMISSION SHOULD BE AFFIRMED.

Respectfully submitted,
CHARLES D. NEWTON,
Attorney-General.
E. C. AIKEN,
Deputy Attorney-General.
Of Counsel for the State Industrial Commission.

NEW YORK CENTRAL RAILROAD COMPANY *v.* BIANC.

AMERICAN KNIFE COMPANY ET AL. *v.* SWEETING.

CLARK KNITTING COMPANY, INC., ET AL. *v.* VAUGHN.

ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

Nos. 374–376. Argued October 22, 23, 1919.—Decided November 10, 1919.

The amendment to the New York Workmen's Compensation Law (*cf. New York Central R. R. Co.* v. *White*, 243 U. S. 188,) providing that, in case of an injury resulting in serious facial or head disfigurement, the commission may, in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed $3,500 (Laws 1916, c. 622,) is not an arbitrary or oppressive exercise of the police power and does not deprive the employer of property without due process in violation of the Fourteenth Amendment. P. 600.

In providing for the compensation of workmen injured in hazardous industries, the State need not base it exclusively on loss of earning power. P. 601.

Whether an award for such disfigurement should be made in combination with or independently of the award for mere inability to work, and whether the compensation should be paid in a single sum or in instalments, are matters of detail for the State to determine. P. 603.

226 N. Y. 199, affirmed.

THE cases are stated in the opinion.

Mr. Robert E. Whalen, with whom *Mr. Frank V. Whiting* was on the brief, for plaintiff in error in No. 374:

The additional award is wholly unrelated to claimant's ability to work. There is not the slightest intimation that the disfigurement has impaired claimant's earning capacity beyond the period for which he was awarded a separate amount for the entire period of disability. Moreover, when that award was made, plaintiff had returned to work.

Only impairment of earning power justifies compulsory payment of workmen's compensation for disabling or fatal injuries inflicted without fault. *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 203–206; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 236, 239, 243. This court has pointed out that "compensation for disabling and fatal injuries irrespective of the question of fault" was involved in the decisions of the cases which sustained the New York and the Washington Acts. *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 163. Mr. Justice Pitney, writing for the majority in *Arizona Employers' Liability Cases*, *ante*, 400, 425, affirmed the power of the people of Arizona to erect safeguards against "leaving the injured ones, and the dependents of those whose lives are lost, through accidents due to the conditions of the occupation, to be a burden upon the public." And at p. 428 he adverted to the sovereign power thus to regulate the conduct of those hazardous industries in which "human beings . . . in the pursuit of a livelihood must expose themselves to death or to physical injuries more or less disabling, with consequent impoverishment, partial or total, of the workman or those dependent upon him."

In *Ball* v. *William Hunt & Sons, Ltd.*, [1912] App. Cas. 496, cited in Mr. Justice Holmes' concurring opinion in the *Arizona Case*, p. 433, Lord Shaw of Dunfermline declared that "the theory and datum upon which such compensation proceeds is that of compensation for injury to the worker as a wage-earner, and it is the incapacity to

earn a wage which forms the standard upon which the compensation is reckoned." (P. 507.)

In the *Arizona Case*, p. 426, a feature of the Arizona Act which was considered to be an element of guaranty of due process was the provision for trial of issues of fact and assessment of damages before a constitutional jury, in a judicial tribunal, in accordance with long established modes and ordinary processes of law—"substantially the common law method." In the case at bar no such safeguard was vouchsafed. Due process of law, however, contemplates that damages, as distinguished from compensation for loss or diminution of earning power during hazardous employment, shall be fixed and awarded, if at all, by a jury and not by a board. Damages, when awarded, must represent the deliberate judgment of a tribunal vested with and exercising judicial functions, not the determination of a body which is clothed with statutory power to proceed as summarily as a court-martial. (§§ 20, 68, N. Y. Workmen's Compensation Act.) See *Erie R. R. Co.* v. *Linnekogel*, 248 Fed. Rep. 389, 392.

The disfigurement clause is not a reasonable exercise of the police power. *White Case, supra*, pp. 206, 207; *Mountain Timber Co. Case, supra*, 238, 243; *Arizona Case, supra*, 420–422.

If, as recognized at p. 207 of the opinion in the *White Case*, the New York Act is not, nor is it asserted to be, a measure in furtherance of health or safety, it remains simply to inquire whether the disfigurement clause has any reasonable relation to the general welfare. The question carries its own answer, since, once adequate provision has been made for loss or diminution of earning capacity, it is of no public concern whether the claimant shall or shall not receive a further award for impairment of good looks not in any wise related to earning power. Repeatedly it has been stated in cognate terms that the subject of judi-

cial inquiry, in such a case as this, is whether the statute under consideration "is arbitrary and unreasonable, from the standpoint of natural justice" (*White Case*, p. 202); or "so entravagant or arbitrary as to constitute an abuse of power" (*Mountain Timber Co. Case*, p. 237.) Such was the test applied in determining the validity of the Arizona Act.

There being no claim that any element of public health or of public safety is involved, and no real consideration of public welfare being presented, it follows that the clause in question is fairly to be characterized as unreasonable and fundamentally unjust.

The question here presented is an open one.

Mr. William H. Foster, for plaintiffs in error in Nos. 375 and 376, argued that an award for disfigurement is not compensation but damages (*New York Central R. R. Co.* v. *White*, 243 U. S. 188, 193; *Matter of Erickson* v. *Preuss*, 223 N. Y. 365, 368); and that the previous decisions of this court upholding compensation laws were based on loss of earning power and the tendency of disablement or death of workmen to render them, or their dependents, burdens on the public charity. In this case there was an entire absence of relation between the disfigurement and loss of earning power, though it is probably true that a person who has a disfigurement may have suffered pain and acquired a certain timidity. An award for mere disfigurement is not within the police power as tested by the previous decisions of this court, because the mere disfigurement is not a matter affecting the public interest.

Mr. E. C. Aiken, Deputy Attorney General of the State of New York, with whom *Mr. Charles D. Newton*, Attorney General of the State of New York, was on the briefs, for the State Industrial Commission.

MR. JUSTICE PITNEY delivered the opinion of the court.

The Workmen's Compensation Law of the State of New York (c. 816, Laws 1913, as amended and reënacted by c. 41, Laws 1914; Cons. Laws, c. 67), which was sustained by this court against attacks based upon the Fourteenth Amendment in *New York Central R. R. Co.* v. *White*, 243 U. S. 188, was amended by Laws 1916, c. 622, among other things by inserting in the 15th section, which contains the schedule of compensation for cases of disability, a clause reading as follows: "In case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars."

The present writs of error bring up for review three judgments of the Court of Appeals of that State, affirming orders of the Supreme Court, Appellate Division, Third Judicial Department, in which awards based upon this amendment were sustained. The opinion of the Court of Appeals, applicable to all of the cases, is reported under the title of *Matter of Sweeting* v. *American Knife Co.*, 226 N. Y. 199.

In each case the Commission found accidental injuries sustained by an employee in a hazardous occupation, arising out of and in the course of the employment, and, as a result of the injury, some serious facial or head disfigurement, or both. In each case an award was made on account of such disfigurement irrespective of the allowance of compensation according to the schedule based upon the average wage of the injured employee and the character and duration of the disability.

The sole contention here is that the amendment of 1916, as thus carried into effect, deprives the respective plaintiffs

in error of property without due process of law, in contravention of the Fourteenth Amendment.

The argument is that an award for disfigurement, made wholly independent of claimant's inability to work, is not based upon impairment of earning power; that only such impairment can justify imposing upon an employer without fault compulsory payment by way of compensation to an injured workman; and hence that the "disfigurement clause" is not a reasonable exercise of the police power, but is arbitrary and oppressive.

In view of our recent decisions sustaining state laws imposing upon employers in the hazardous industries responsibility in one form or another for the consequences of injuries received by employees in the course of the employment in the absence of fault on the employer's part (*New York Central R. R. Co.* v. *White*, 243 U. S. 188; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Arizona Employers' Liability Cases*, *ante*, 400), little need now be said.

Even were impairment of earning power the sole justification for imposing compulsory payment of workmen's compensation upon the employer in such cases, it would be sufficient answer to the present contention to say that a serious disfigurement of the face or head reasonably may be regarded as having a direct relation to the injured person's earning power, irrespective of its effect upon his mere capacity for work.

Under ordinary conditions of life, a serious and unnatural disfigurement of the face or head very probably may have a harmful effect upon the ability of the injured person to obtain or retain employment. Laying aside exceptional cases, which we must assume will be fairly dealt with in the proper and equitable administration of the act, such a disfigurement may render one repulsive or offensive to the sight, displeasing, or at least less pleasing, to employer, to fellow employees, and to patrons or custom-

ers. See *Ball* v. *Wm. Hunt & Sons, Ltd.*, [1912] App. Cas. 496.

But we cannot concede that impairment of earning power is the sole ground upon which compulsory compensation to injured workmen legitimately may be based. Unquestionably it is a rational basis, and it is adopted for the generality of cases by the New York law. But the Court of Appeals has construed the 1916 amendment as permitting an allowance for facial or head disfigurement although it does not impair the claimant's earning capacity. *Matter of Erickson* v. *Preuss*, 223 N. Y. 365, 368; and see opinion of Judge Cardozo in the present case, 226 N. Y. 199, 200. In view of this, and there being no specific finding of such impairment in these cases, it is proper to say that in our opinion the "due process of law" clause of the Fourteenth Amendment does not require the States to base compulsory compensation solely upon loss of earning power.

The New York law as at first enacted, the Washington, and the Arizona laws presented for our consideration three different methods adopted for the purpose of imposing upon the industry the burden of making some compensation for the human wastage attributable to the hazards of the work. We were unable to find that any of these ran counter to the "due process" clause. Nor does that provision debar a State from adopting other methods, or a composite of different methods, provided the result be not inconsistent with fundamental rights. As was stated in the *Arizona Case, ante*, 429: "If a State recognizes or establishes a right of action for compensation to injured workmen upon grounds not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law, or according to some prescribed scale reasonably adapted to produce a fair result, is for the State itself to determine." And we see no constitutional reason why a State may not,

in ascertaining the amount of such compensation in particular cases, take into consideration any substantial physical impairment attributable to the injury, whether it immediately affects earning capacity or not.

For the reasons thus outlined, it was not unreasonable, arbitrary, or contrary to fundamental right to embody in the New York Workmen's Compensation Law a provision for a special allowance of compensation for a serious disfigurement of the face or head. Nor is there any ground for declaring that the allowance prescribed by the 1916 amendment exceeds the constitutional limitations upon state power.

Whether an award for such disfigurement should be made in combination with or independent of the compensation allowed for the mere inability to work is a matter of detail for the State to determine. The same is true of the question whether the compensation should be paid in a single sum, or in instalments. *Arizona Employers' Liability Cases, ante,* 400, 429.

Judgments affirmed.

MR. JUSTICE MCREYNOLDS dissents.

BANK OF OXFORD ET AL. v. LOVE ET AL., BANK